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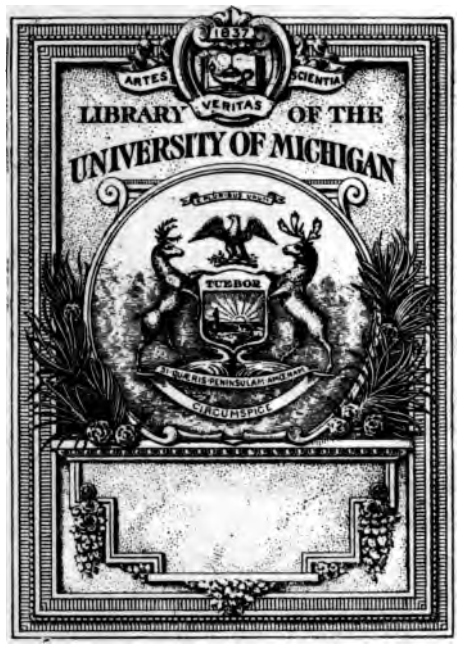
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WORKMEN'S COMPENSATION

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WORKMEN'S COMPENSATION

BY

J. E. RHODES, 2d

New York

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1917

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DEDICATED

TO

WALTER GOODMAN COWLES

PROFOUND STUDENT

AND

PRACTICAL ADMINISTRATOR

OF THE PROBLEMS

OF

WORKMEN'S COMPENSATION

Reclass. 3-8-30 A.V.M.

FOREWORD

This book has been written in the attempt to give a brief history of the Workmen's Compensation movement in this country, and an outline of the principles on which the system is based. Certain limitations must be recognised in a work of this nature, when it is confined within any reasonable size, and so little or no attempt has been made to go into the details of the compensation movement, and as the position taken in the book is that the problem is one which is national in its scope, but local in its solution because of constitutional restrictions, the problem is considered in its national rather than in its local aspects. It is possible that a more logical method of treatment might demand a detailed consideration of the problem as it has been worked out in each individual state, but this method would have necessitated too much of a deviation from the position taken that the problem is national rather than local, and so this phase of the problem has been emphasised at the possible expense of logical arrangement.

A superficial consideration of the Workmen's Compensation problem as it has been worked out in this country may serve to emphasise the differences in the details of the laws of the different states, but a deeper study of the problem shows that although the laws vary in detail there are certain general and fundamental principles upon which all are based, and the attempt has been made to outline and emphasise those principles in this book. Further than that it cannot go, but copious references to the literature of this movement are given so that the student of the subject who desires to make a deeper

study has the references given him for that study. It is hoped, therefore, that the book may be of value to two classes of readers. To the student who desires a general knowledge of the subject it offers an outline of the history and principles of Workmen's Compensation; to the student who may desire a deeper knowledge it will serve as a guide for further study.

J. E. RHODES, 2D.

Hartford, Conn., April, 1917.

CONTENTS

CHAPTER		PAGE
I	Introductory Survey	1
II	Industrial Accidents and Accident Insurance	21
III	European Background	41
IV	The Agitation in the United States	63
V	Early Attempts in the United States	85
VI	The Constitutionality of Compensation Legislation	107
VII	Compensation Legislation in the United States	129
VIII	The Insurance of the Compensation Obligation	157
IX	The Administration of Compensation Laws	180
X	Some Social Aspects of Workmen's Compensation	202

APPENDIX

A	The Workmen's Compensation Movement in New York	226
B	Standards for Workmen's Compensation Laws	238
C	Digest of Workmen's Compensation Laws	250
	Bibliography	278
	Table of Cases Cited	289
	Index	291

WORKMEN'S COMPENSATION

WORKMEN'S COMPENSATION

CHAPTER I

INTRODUCTORY SURVEY

The first general workmen's compensation law to stand the test of constitutionality and become operative in the United States was the New Jersey law, which was approved April 4, 1911 and became effective July 4, 1911.[1] It was predicted that the extension of the compensation principle, when the difficulties which were supposed to stand in the way of the enactment of any such legislation that would stand the test of constitutionality were once surmounted, would be rapid, and this prediction has been fulfilled, for the change from the common law system of employers' liability to the system of employers' liability recognised by

[1] The Act of Congress of May 30, 1908, which took effect on August 1, 1908, extended the compensation principle to certain classes of government employees, but this act is so limited in its scope and application that it can hardly be considered a scientific compensation law. *Chapter 236, Acts of 1907–8.* For an account of the administration of this law see the volume of Opinions of the Solicitor, Department of Labor, Workmen's Compensation, Washington, 1915. Other laws were passed in different states prior to 1911 which attempted to put the compensation principle into operation under certain limitations, but these laws either were declared unconstitutional or became inoperative by disuse, so that the New Jersey law stands forth as the first constitutional compensation law to become effective in the United States.

workmen's compensation legislation is the most remarkable transition of its kind in the history of the United States. While the actual change from the common law system to the compensation system by legislative action, for this is the only way in which it could be legally accomplished, was sudden, it must not be assumed that the movement in itself was sudden or impetuous, nor was the agitation confined to any one part of the civilised world, for it was a legal change necessitated by previous economic and social changes, and the agitation which resulted in the transition was a world movement.

The compensation movement must, therefore, be considered in its historical aspect in order to obtain the proper perspective of the compensation principle, and while this study of the principle is confined particularly to its history and operation in the United States it is practically impossible to separate the history of the movement in any one locality from that of other localities, and as the United States was the last of the civilised nations to adopt the principle its history and development in the other nations must be understood before we can have any background for the study of the movement in the United States. The compensation principle had been generally adopted as a part of the jurisprudence of the different European nations prior to the close of the nineteenth century, but as far as the United States was concerned this problem was one of the social and political legacies left to the twentieth century by its predecessor for solution.

While it may be interesting to note the result of the agitation in practically all of the European nations, it is particularly valuable, and necessary, in fact, to have a general understanding of the subject in Germany and Great Britain as a basis for the study of this problem in the United

States, but before giving any description of the compensation systems of any of the European nations it is necessary to take a casual survey of the different economic and social changes which necessitated the repudiation of the common law system and the adoption of the compensation system. It has become a matter of usage to apply the term "Employers' Liability" to the common law system and the term "Workmen's Compensation" to the compensation system, but strictly speaking this is an inaccuracy and should be corrected in the beginning, for both the common law system and its statutory successor, the compensation system, are parts of the general legal system of employers' liability, and for the sake of legal accuracy the use of the term "Employers' Liability" should be discontinued when referring to a part of the system and should be used only in its general and proper meaning. The terms used here, therefore, will be "the common law system" and "the compensation system."

The general subject of employers' liability deals with the right of an employee to recover damages from his employer for injuries sustained while in the course of his employment and alleged to have arisen out of it. The law of employers' liability, as a part of the more comprehensive subject of Master and Servant, is a development of the nineteenth century, and particularly of the latter half of that century, and we must now consider specially the development of the law in Great Britain and the United States, for we are particularly concerned with the transition from the common law system to the compensation system in those two countries.

The essential difference between these two systems is that under the common law system the injured employee cannot recover damages from the employer unless he can show that his injuries were received under circumstances which impose

a legal responsibility on the employer, while under the compensation system the theory is recognised that industry should bear at least a proportional share of the financial losses caused by industrial accidents. This general statement as to the compensation principle is subject to certain qualifications which cannot be considered here but will be noted later. As law is essentially a conservative force, and changes in established and recognised legal doctrines are usually necessitated by economic and social changes which have already taken place, so the repudiation of the common law system of employers' liability and the adoption of the compensation system was necessitated by the evolution in industrial life during the nineteenth century, and the transition of the relation of master and servant to that of employer and employee.

The essential fact and the controlling factor in this industrial revolution was the change from hand labour, or hand labour in connection with simple tools and machinery, to power-driven machinery, and the changes which necessarily came as a result of this transition. The different factors which contributed in effecting the transition will be mentioned but briefly, for it is with the results rather than the causes that we are particularly concerned, but brief mention must be made of the causes which effected these results. The underlying factor in the change was the development of a new form of motive power, steam, and concurrent with the development of the steam-engine the invention of a number of mechanical devices which superseded hand labour in manufacturing processes. This transition centered around the textile industries, and it is in its connection with those industries that it will be particularly considered.

The change started during the latter half of the eighteenth century and was fully consummated during the nineteenth

century, and as the stages of human history are known it is termed the transition from the handicraft stage to the industrial stage. The distinguishing feature of the former stage is that in it the production of supplies for human wants was conducted by hand, or by hand assisted by simple machinery, while in the latter stage the manufacture had passed from the simple methods in use in the former stage to the complex methods which followed the substitution of machine labour for hand labour. During the handicraft stage the simple manufacturing operations were conducted in the home, by the master of the house assisted by his family, or by a single helper or a few helpers, or if the operations were conducted apart from the home it was under simple conditions where a few servants worked together with a common master for a common end. The relations of the master and the servant were close and personal, and their interests were identical. In the industrial stage the factory was substituted for the home or the small shop, the machine for the hand tools, the impersonal corporation for the personal master, and the simple relation of master and servant passed to the complex relation of employer and employee.

The inventions which particularly affected the textile industries were the cotton gin, the spinning-jenny, the "mule," and the power loom, and all of these inventions came within a period of less than thirty years, from 1764 to 1792. Although the cotton gin was the last in the series it is mentioned first, because it is the first machine used in the manufacture of cotton and it was fundamental to the usefulness and development of the other machinery. It was the only one of these great inventions which was invented in the United States; all of the others were invented in England. With the perfection and adoption of these different mechanical devices the old order passed and a new order came into being.

The handicraft stage passed into the industrial stage. The home or the small shop could not accommodate the new machinery, so the factory became a necessity. The individual did not possess the necessary capital to own and operate the machines which were essential for the different processes, so several individuals combined to become employers, the partnership developed on a scale hitherto unknown, and the corporation, which possesses the fiction of a legal entity apart from the existence of the individuals which compose it, was adapted to the necessities of industrial life when the inapplicability of the partnership to the new industrial order was shown.

The effect of this transition on the workman was, in brief, that the working-place was transferred from the home or the small shop to the large factory. It became necessary for him to live near the place where he was working, so large settlements grew up around the factory, and if several factories were located in close proximity a city grew up in that locality. Thus the conditions of living passed from country life to city life, and as these factory cities were of sudden growth little attention was paid to sanitation or proper living conditions until the necessity of such attention had been shown by sad experience to an awakened public conscience. The relation of master and servant during the handicraft stage had been essentially a personal relation, but with the transition this relation is more properly designated as that of employer and employee, because the personal element was gradually eliminated as manufacturing operations became larger and the identity of the individual was merged in that of the mass. Thus the lines of class distinction became clearly and sharply drawn between the capitalistic class and the labouring class.

The political tendencies, in the meantime, had been towards

the enlargement of the political and civil rights of the individual, so we have the paradox that while the individual was gaining his political rights his social condition was becoming one of economic servitude. The whole spirit of theoretical economics as the science was developed in England and in English-speaking countries was based on the political and consequent social independence of the individual, while the practical economic and industrial development was tending to deprive him of the very freedom which economic and political theory was extending to him. The recognition of this fact is fundamental to the study of compensation, for the very basis of the compensation system is a legal recognition of the practical economic condition and a repudiation of the individualistic theory upon which the common law system of employers' liability is based.

One of the unfortunate incidents of this industrial revolution, and one which increased both in volume and in the severity of its effects as time passed and industrial operations became more intense, was the "industrial accident." This term is used particularly to apply to accidents which happen to workmen during the course of their employment and arise from the operations which are incident to the employment. This was a negligible factor if it was present at all during the handicraft stage, for under the simple industrial conditions of that time none of the causes which gave rise to the industrial accident of the industrial stage were present, and the few accidents which may have happened to the servant while he was engaged in his work were of a minor nature. Therefore no attempts were made by servants to recover damages from their masters for the effects of any such accidents, so the law of employers' liability is one of the legal developments of the industrial stage.

The right of a servant to recover against his master, or of

an employee to recover against his employer, for injuries sustained during the course of his employment comes within the domain of the law of negligence, and while the right is determined on the general principles of negligence still there are certain rules which are recognised in employers' liability cases which are not present when the relation of employer and employee does not exist. The effect of the recognition of these principles with the strictness prescribed by the common law, has resulted in hardship to the employee, and the result of their application has been, in brief, that at first different legislative modifications were made to mitigate the position of the employee, and as these modifications have failed to accomplish the full effect desired the common law system has been repudiated and the compensation system established.

It is necessary to review briefly the common law rules of employers' liability in order that we may have the proper basis for the study of the compensation system, for as the compensation system was necessitated by the shortcomings of the common law system we cannot understand why the change was necessary unless we possess a general knowledge of the principles of the common law system, so that we can see wherein it failed to adapt itself, and how it was in fact incapable of adaptation, to the changed conditions of industrial life. It has already been noted that law is a conservative force, and as the law cannot anticipate economic and social changes legal changes follow in the wake of evolution and transformation in economic and social life. The result is, therefore, that existing rules of law and existing legal institutions are often perpetuated long after their applicability has ended, and that legal changes which have long been necessary are made only after the necessity for change has been so clearly shown that the existing rules can no longer be endured. A comprehensive understanding of this prin-

ciple is necessary in the study of workmen's compensation, for while all unprejudiced students of the subject had long admitted the shortcomings of the common law system of employers' liability, the transition to the compensation system was delayed by the natural conservatism of the law until long after the necessity for the change had been undebatably demonstrated by practical experience. This is particularly true in the United States, and the reasons why the change was delayed will be shown as we proceed.

The common law consists of certain general principles of right and justice which are recognised by the courts as controlling in controversies between parties, and these rules do not depend for their force on any statutory enactments but simply on general recognition.[1] The common law rules of

[1] The words of Chancellor Kent in describing the nature and source of the common law are so apt and appropriate that I am quoting him briefly, as follows:

"The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.

"A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural and of cultivated reason to particular cases.

"The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of the common law. Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason; and the diligence of counsel, and the labor of judges are constantly required, in the study of the reports, in order to understand accurately their import, and the principles they establish." Kent's Commentaries, Lecture XXI.

For some judicial observations on the expansive character of the common law, and its theoretical fitness to adapt itself to all conditions, see the opinion of Chief Justice Shaw in the case of *Norway Plains Co. v. Boston & Maine R. R. Co.*, 1 Gray, 263. The failure of this theory

employers' liability, as one phase of the law of Master and Servant, are an outgrowth of the law of Master and Servant which was recognised at the beginning of the industrial stage. While it is the theory of the common law that it is expansive enough to adapt itself to changed conditions, this theory has failed to work out in practice, and its failure has been no more apparent in any branch of the law than it has in its application to the law of employers' liability. The attempts to remedy the defects of specific rules of the common law system of employers' liability by statute have been such conspicuous failures that a repudiation of the basis of the system was necessary, and this repudiation was effected by the adoption of the compensation system, which eliminates the idea of legal fault on the part of the employer as a basis of recovery.

The common law rules of Master and Servant prior to the industrial stage centre around two principles, the liability of a master to third parties for the torts of his servant committed during the course of his employment, and the rights of the master against third parties for interference with the employment. The common law rules of this time which were applicable to the relation of master and servant were based on principles that became established when the status of the servant was little better than that of a slave. The master could be held liable by third parties for injuries done to them by reason of the negligence of his servant while engaged in the work of the master, but it was held that this negligence must arise from some act in connection with the master's work before liability could be imposed on the master. He could not be held liable for the negligence of the servant in matters outside the scope of his employment. On the other

to work out in practice cannot be too strongly emphasised, for it is the basis of all of the statutory modifications of common law rules.

hand the master might aid his servant in enforcing a right against a stranger without being guilty of maintenance. He could bring an action against any man for beating or maiming his servant if loss of service could be shown, and he could justify an assault in defence of his servant. He also had an action for damages against any person enticing his servant away from him.[1]

The industrial accident of the industrial stage gave rise to a new phase in the law of Master and Servant, and it is the factor which was responsible for the development of the rules of employers' liability. This phase of the law of Master and Servant, as has already been stated, deals with the right of an injured employee to recover damages from his employer for injuries sustained during the course of his employment and alleged to have arisen out of it. The right is based on the general principle of the law of Negligence that one who is injured by the fault of another has a right to recover damages from the wrongdoer for the injuries sustained. To apply this principle to the relation of employer and employee the general statement of the law is that if an injured employee can show that his injury was caused by fault on the part of the employer he can recover damages from the employer, but if the employer was in no way in fault no recovery against him can be had.

This idea of the fault of the employer as a basis of recovery under the common law system is fundamental, and it is also fundamental to understand that in contemplation of law the position of the employer and employee was one of equality. The only way in which an injured employee could enforce his right against his employer was through the courts, and so if the employer refused to recognise the

[1] For a summary of the early law of Master and Servant see Chapter XIV, Volume 1, *Blackstone's Commentaries*.

claim of his employee the only course open to the employee, if he desired to proceed with his claim, was to resort to the courts and if he was unable to establish his claim for damages in the courts no damages could be recovered. In theory the rights of both the employer and employee before the law are equal, but it was this very theoretical equality that gave rise to many of the hardships of an injured employee under the common law system.

As employers' liability cases were decided by the courts in actual litigation the duties of the employer to his employee became crystalised in a few general principles which are simple enough in their statement and too often correspondingly indefinite in their application. All of these principles centre around the obligation of the employer to furnish his employee with safe working conditions and are ramifications of that obligation, but as that statement of the obligation is too general and indefinite it may be said that the employer owes it to his employee, at common law, to provide him with a safe place within which to do his work, to furnish safe and suitable tools with which to do the work, to surround him with reasonably safe and competent fellow-servants, and to give him the necessary instructions as to how the work should be done. Unless the employee can show a violation of some one or more of these obligations he can recover no damages from his employer for injuries sustained during the course of his employment, and the only finality as to the employee's right to recover in cases where the employer contests his right is the decision of a court of last resort.

The defence of the employer in employers' liability cases centres around three particular defences, any one of which if established is sufficient to defeat recovery. These are the defence of contributory negligence, that of assumption of risk, and the fellow-servant rule. Only brief mention will

be made of these defences, for the general basis of each defence can be readily understood from its name. The contributory negligence rule is that if an injury is caused by the negligence of the injured employee himself he cannot recover from his employer; that of assumption of risk is that if an injury is caused by a danger inherent in the occupation, and against which the employee is, in theory, as well able to protect himself as the employer can protect him, there can be no recovery from the employer; the fellow-servant rule is that if an injury is caused by the negligence of a co-employee the employer is not liable. These general statements as to the defences named are all subject to certain qualifications, but this is an outline of the principles on which they are based.[1]

The bill of particulars in the indictment against the common law system of employers' liability can be summarised under four general headings. These may be defined as the uncertainty as to the basis of a claim for damages under the common law, the delay incident to the enforcement of a claim in the courts, the uncertainty as to the amount of damages which may be awarded, and the uncertainty as to the collection of a judgment after one has been obtained and sustained. It is the object of the compensation system to eliminate each one of these defects as far as possible, and as the principles of compensation are discussed with some detail it will be shown how this system has proceeded to

[1] It is of particular importance that the general principles of these defences should be understood, not only because of the fact that their application in the common law system of employers' liability to our complex industrial operations was one of the principal factors in disclosing the defects of the system, but also because of the part that they have played in eliminating some of the constitutional obstacles which have prevented the enactment of compulsory compensation laws in the United States, and have compelled the enactment of elective laws.

eliminate the defects named. As a fitting close to this chapter each of these defects of the common law system will be briefly considered.

As the terms in which the common law defines the obligation of an employer to his employee are very general in their nature, the indefiniteness of the obligation often gives rise to a doubt as to whether or not the employer has violated any of his legal duties when an injured employee makes a claim against him for damages, and when a violation of the obligation is alleged by the employee and denied by the employer the only course open to the employee is either to abandon his claim or submit it to the court for adjudication. The court consists of two elements, the judge and the jury, the distinctive function of the judge being to pass on questions of law and that of the jury to pass on questions of fact. As any case may involve questions both of law and of fact it is necessary for a litigant first to establish the legal basis of his claim and then to produce the facts with which to substantiate the claim. The element of uncertainty on the part of the claimant as to his ability to do this is often strong enough to discourage the attempt to establish what may seem to be a perfectly valid claim. Attempts to enforce claims in which the right to recover appears to be beyond question may result in failure, and on the other hand judgments are often obtained by claimants in cases in which the right to recover seemed to be very doubtful. This uncertainty as to the right to recover has resulted in an extremely chaotic condition, not only in employers' liability cases but in negligence litigation generally.

The delay which is incident to the customary and orderly procedure of litigation in the courts is frequently a serious obstacle to the employee in the enforcement of his rights. In litigation of this sort the economic advantage is with the

employer, for the employee who has received an injury which resulted in any considerable incapacity is seldom able of himself to stand any great delay, and this situation often forces the settlement of meritorious claims for much less than their actual value. The basis of this delay is the security with which the law surrounds the rights of all litigants, but this very solicitude for the rights of all is frequently an instrument of oppression for some. The time necessarily consumed in litigation varies according to circumstances and according to the procedure in the different states, but if a case is fought through the court of last resort several years may be consumed in the litigation. The claimant may be an object of charity during the course of the litigation, and there is always the possibility of ultimate defeat. His pleadings must first stand the test of judicial scrutiny and then his facts must convince the jury. Any alleged error in the trial must be passed on by an appellate court, so the element of delay may be a very practical and very serious obstacle. One phase of this element of delay is that of the expense of sustaining the litigation. If a claimant is defeated in the lower court it is necessary for him to stand the expense incident to an appeal if he desires to proceed with the case, and as this expense is often prohibitive he is frequently unable to meet it and is therefore forced to abandon the litigation.

The principles of the common law which relate to the assessment of damages are responsible for the uncertainty as to the amount of damages which may be recovered when an injured employee has established his right to recover. The general principle upon which the rules of damages in all negligence cases are based is that the damages awarded shall be compensatory, as far as it is possible to fix pecuniary compensation for personal injuries. The assessment of damages is essentially a question of fact, so the amount is for the

jury to determine. The trial judge, or the appellate court, does not disturb the decision of the jury unless it is evident that the jury has violated instructions or the amount awarded is manifestly inadequate or excessive. The practical result of the operation of this principle has been that in many negligence cases the damages fixed have appeared to be inadequate but not so inadequate as to justify interference with the verdict of the jury, while in other cases the damages may appear excessive but not so excessive as to justify the setting aside of the verdict, or the entering of a remittitur cutting down the amount. Another result has been the speculation as to the amount of damages in cases where the right of recovery in itself is doubtful, and in those cases where it appears that the serious injuries that may be shown will cause the juries to give large verdicts. This last element is one which is to a considerable extent responsible for the large volume of negligence litigation which has congested the courts.

The element of uncertainty as to the collection of a judgment after one has been obtained and sustained is mentioned largely because of the contrast between the security of payment of compensation provided by the best compensation laws, as one of the necessary elements of any well-considered compensation system, and the lack of security under the common law system. The payment of a judgment at the conclusion of the proceedings in litigation under the common law depends upon the ability of the defendant to satisfy the judgment, and it is a practical situation that the effect of a judgment may be lost by reason of the inability of the defendant to satisfy it. Payment may have been secured by attachment or by bond, but this is an incident of the litigation rather than a part of it, so that if it is the misfortune of the plaintiff that the defendant is unable to pay the judgment, and the plaintiff has no security for its payment, his position is virtu-

ally that of defeat, and it may be even worse than it would have been had he made no effort to enforce his rights because of the obligations which may have been incurred in the way of expenses during the course of the litigation. This is a practical condition which the compensation system has attempted to remedy, as it has attempted to remedy the other defects of the common law system.[1]

[1] Probably no one case in the many thousands of employers' liability decisions which are recorded in the reports illustrates the different defects of the common law system to which attention has been called better than the Rhode Island case of *Carr v. American Locomotive Co.* Many cases illustrate one or more of the defects, but it is rare that a case is found which shows the defects, and so many of them, as clearly as does this case, and for that reason, and for the purpose of giving a concrete illustration of the different defects, a brief history of that case is given in this note.

The accident which was responsible for this litigation happened on June 28, 1902. Peter Carr, a boy who was eighteen years of age at that time, was working for the defendant in its shops at Providence, Rhode Island, and was operating an oil-burning rivet heater. It was alleged as the basis of his action that the stem of a valve on the heater blew out and that the plaintiff was badly burned by the oil which escaped. An impartial student of this case cannot fail to be impressed by the fact that the probable cause of this accident was that Carr inadvertently unscrewed the stem so far that it dropped out, so that the defence of contributory negligence should have been a complete bar to his action. The basis of his action was the alleged defective condition of the valve. The case was tried before a jury four times, and it was before the Supreme Court four times. The final decision, sustaining the verdict rendered at the fourth trial, was rendered by the Supreme Court on July 12, 1910, over eight years after the accident happened.

The first trial resulted in a disagreement of the jury, so that there was nothing to do but to submit the case to the jury a second time.

The second trial resulted in a verdict for $18,000.00. This was reversed by the Supreme Court on May 25, 1904, and the case remanded for another trial. The case is reported in 26 R. I. 180; 58 Atl. 678. The jury found specially that the thread on the stem of the valve was not in good condition, and that the thread in the body of the valve was not in good condition; that the stem produced at the trial was the stem operated at the time of the accident, and that the burner and

burner-valve produced were those operated at the time of the accident. The jury also found that the accident was not caused by an explosion of gases in the pipe which supplied the furnace with oil. A new trial was granted because the verdict rendered was contrary to the evidence. It was shown that the valve used was of the same type in general use by other concerns.

The third trial resulted in a verdict for $20,000.00. A motion for a new trial was denied by the presiding justice. The statute had been changed since the previous trial so that a motion for a new trial was passed upon by the presiding justice instead of the Supreme Court. The case was reversed by the Supreme Court on July 9, 1908, and remanded for another trial. The case is reported in 29 R. I. 276; 70 Atl. 196. The jury found specially: (1) That the thread on the stem in use at the time of the accident was not in good working order. (2) That the thread on the body of the valve was in good working order. (3) That the stem produced at the trial was not the stem in operation at the time of the accident. (4) That the burner-valve produced exclusive of the stem was that in operation at the time of the accident. (5) That the accident was not caused by an explosion of gases. The evidence preponderated strongly against the contention as to the condition of the stem at the time of the accident, and in favor of the contention that the stem produced was the identical stem in operation when Carr was injured. There were fifty-six different exceptions as to the admission of testimony upon which the Supreme Court ruled.

In the interval between the second and fourth arguments in the Supreme Court the case was again before the Supreme Court, this time for a ruling on some of the technicalities involved in the procedure on appeal. 30 R. I. 330; 75 Atl. 399. This decision was rendered March 3, 1910.

The fourth trial resulted in a verdict for $22,895.00 A motion for a new trial was made and it was granted by the presiding justice. On appeal his action was reversed by the Supreme Court and judgment ordered entered on the verdict. This was on July 12, 1910. The case is reported in 31 R. I. 234; 77 Atl. 104. The jury found specially: (1) That the stem produced at the trial was not the stem in operation at the time of the accident. (2) That the thread of the stem in operation at the time of the accident was not in good working condition. (3) That the thread in the body of the valve was in good working condition. (4) That the stem in the middle valve blew out while being operated by the plaintiff. (5) That the agents of the defendant in charge of the boiler shop had been notified that the stem had blown out prior to this accident. The court held that after three concurring verdicts it would no longer interfere with the findings of

the jury where no errors of law had been committed. One justice dissented from the decision of the Supreme Court.

The history of this case is given with some detail because it is such a good illustration of the different defects in the common law system to which attention has been called. In the first place, the contention of the plaintiff that the stem blew out and that of the defendant that the plaintiff inadvertently unscrewed it until it dropped out gave rise to a controversy as to the very basis of the plaintiff's right of recovery, and compelled the submission of the issue to a jury as the only means of settlement. The disagreement of the first jury which passed on the issue showed that there was some reasonable doubt as to just how the accident happened, and the action of the Supreme Court in setting aside two verdicts showed that the jury must have disregarded some of the evidence which the defendant submitted. This phase of the case serves to illustrate one factor which must always be considered in negligence cases, and that is the sympathy which the jury generally feels for an injured plaintiff, particularly with a corporation for a defendant, and that element is plainly present in this case. This sympathy may develop into a prejudice, so that facts are often disregarded by a jury in order to render a verdict for the plaintiff. This is a disturbing force which is responsible for much of the uncertainty which is present in negligence litigation.

The element of delay is shown by the fact that over eight years elapsed between the time of the accident and final judgment. It was nearly two years from the time of the accident to the first reversal; over four years elapsed between the first and second decisions of the Supreme Court, and just a little over two years between the second reversal and final judgment for the plaintiff. The delay that may be incident to litigation under the common law system is so clearly shown by this case that further comment on such possibilities is unnecessary.

The first verdict for $18,000.00, the second for $20,000.00 and the third for $22,895.00 show the uncertainty as to the amount of recovery. The plaintiff was seriously injured, the jury had ample opportunity to speculate on the amount of damages, and it appears that they exercised this privilege about to the limit. Each succeeding jury was doubtless influenced by the fact of the preceding verdict, for it frequently happens that when an appellate court has set aside a verdict the next succeeding verdict is larger than its predecessor.

The element of uncertainty as to the collection of the judgment does not appear to have been present in this case, for the defendant was a large corporation and was doubtless able to satisfy the final judgment.

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CHAPTER II

INDUSTRIAL ACCIDENTS AND ACCIDENT INSURANCE

The industrial accident is one of the regrettable incidents of the industrial era. With the change from hand tools to power-driven machinery and as that machinery became more and more complicated, and as the use of machinery increased the pressure of industrial operations, the ability of the employee to protect himself from the hazards to which he was necessarily exposed became lessened, until it seemed as if in some occupations the employee was obliged to expose himself to hazards against the effects of which it was almost impossible to protect him. The general subject of industrial accidents cannot be limited in its application to the relation of employer and employee, for there are many dangers connected with our modern industrial operations to which members of the public as well as the employees engaged in the work are exposed, but as the study of the industrial accident in its application to workmen's compensation deals only with the relation of employer and employee, the subject will not be considered in its application to society in general except as such consideration may be incidental to this phase of the subject.

As the common law rules of employers' liability are based upon the assumption of political, economic and social independence, the position of employer and employee before the law was one of equality. The individual employee could, in theory, bargain with his employer on a basis of equality; he could work for any particular employer or not, just as he chose, and as he had this theoretical option to leave the service

of his employer if the working conditions for any reason were not to his liking, he was consequently held by the law to assume the risk of any hazards that might be inherent in his employment, and also to assume the risk of injury from the negligence of any competent fellow-servants who might be employed with him. This principle, it will be seen, is the basis of the defence of assumption of risk and of the fellow-servant rule. The defence of contributory negligence does not rest so much upon this principle of the legal equality of employer and employee as it does upon the general obligation which rests upon each individual to protect himself from all dangers, and the resulting corollary that if any one is injured by his own negligence he has nobody but himself to blame, and there is, therefore, no reason why any one else should be held responsible for his injury.[1]

[1] The extent to which the common law carries this individualistic theory is well illustrated by the case of *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, decided in 1861. In this case the plaintiff, *a boy ten years old*, was injured by having his right hand caught in the gearing of a spinning frame in the mill of the defendant, on April 6, 1859, after he had been in the defendant's employ only three weeks. The case was submitted to the jury, a verdict for $1,875.00 was rendered in favour of the plaintiff, the defendant made a motion for a new trial, and a new trial was advised. The defendant asked the trial judge to give the jury four specific instructions as to the law, none of which were given as requested. The action of the Supreme Court of Errors in granting a new trial was based on the modification by the trial judge of the second and third requests of the defendant, which were as follows:—

"2. That the general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specific duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services.

"3. That he who enters the service of another with the machinery and implements of the employer's business in a given condition, with the knowledge of such condition, waives any claim upon the employer to furnish other and greater safeguards."

The Supreme Court of Errors held that these requests were correct

The general subject of the industrial accident cannot be onsidered here in any detail. It must be assumed for our urpose that the industrial accident is one of the unfortunate ıcidents of our industrial life. Its causes and effects can nd will be briefly outlined. While this problem may become pparent by the sight of any workman who has received seri- us injuries in connection with his work, or the knowledge f a family left destitute by reason of an industrial fatality, 're are in the beginning handicapped in any general study f the subject because of the lack of general statistics. This bservation is particularly true in its application to the Jnited States, for as this country has lagged behind the rest

tatements of the law, and that they should have been allowed by the rial judge. The decision shows how harsh and inequitable the com- ıon law rules were in their application to injuries received by persons f tender age and how the principles of individualism were carried to he extreme. Note the following quotation from the opinion:

"Every manufacturer has a right to choose the machinery to be used n his business and to conduct that business in the manner most agree- .ble to himself provided he does not thereby violate the law of the and. He may select his appliances, and run his mill with old or new nachinery, just as he may ride in an old or new carriage, navigate an ıld or new vessel, or occupy an old or new house, as he pleases. The mployee having knowledge of the circumstances, and entering his serv- ce for the stipulated reward, cannot complain of the peculiar taste and ıabits of the employer, nor sue him for damages sustained and result- ng from that peculiar service."

As to this particular case the courts said:—

"The employee here was acquainted with the hazards of the business n which he was engaged, and with the kind of machinery used in :arrying on the business. He must be held to have understood the ordi- ıary hazards attending *his employment* and therefore to have volun- :arily taken upon himself this hazard when he entered into the defend- ant's service."

This case is cited merely as an illustrative case of the extreme loctrines of the common law. Such a decision would be impossible under the common law system of employers' liability at the present :ime, because of the different Child Labor laws which have been passed, ınd also because of the changed attitude of the courts generally as to ıegligence cases in which the rights of children of tender years are nvolved.

of the civilised world in many matters of social legislation, the proper basis for the study of many of our social problems is lacking. While the problem of the industrial accident as the basis of the subject of employers' liability is one which is national in its scope, it is local in its application and solution because of our system of government. The jurisdiction of Congress is limited in matters of this nature, so that the problem as a whole is one within the control of the states, and the conditions in the different states are so diverse that uniformity in matters relating to employers' liability is practically impossible, so the statistics relating to the problem of the industrial accident in its application to the country as a whole have never been collected and compiled in workable shape. The different compilations, outside of the few matters over which Congress has jurisdiction, are limited to specific localities or to the confines of a particular state. The statistics which we have, however, are sufficient to show the extent of the problem.[1]

[1] The authoritative investigations of the United States Government are limited to matters of federal jurisdiction, and this relates principally to the instrumentalities of interstate commerce, so the best statistics which we have as a result of federal investigations are those collected by the Interstate Commerce Commission. This does not mean that general statistics are not collected by the federal government, for such investigations and compilations have been made for a number of years by what is now the Bureau of Labor Statistics of the Department of Labor, and the results constitute a valuable contribution to the literature of the subject of industrial accidents.

The Labor Bureaus of some of the states attempt to collect and classify the statistics of industrial accidents in their own jurisdictions, but as there is little or no uniformity in the work as conducted by the different states the resulting statistics are of value only as applied to the problem in the particular jurisdiction in which the statistics were collected, and their value depends on the manner in which the work was done. It is an unfortunate fact that too often the Labor Bureaus of the different states do not have the facilities at their command for full investigations. Voluntary investigations are also fre-

The classification of industrial accidents as to causes with any degree of accuracy is very difficult, if not impossible. The most general division in any classification would separate the accidents into those which were caused by the fault of the employer, those caused by the fault of the employee, and those caused by dangers and hazards which are inherent in the particular occupation in which the injured was engaged. This general classification is satisfactory for illustrative purposes, and a casual examination of even a comparatively small number of industrial accidents, taken at random and without any attempt at selection, would soon convince the investigator that the greater number of the accidents fell within the category of those caused by the fault of the injured himself, or were caused by the hazards incident to the business, and that those for which the employer could be held legally responsible constituted a very small proportion of the entire number.[1]

This problem in its economic aspect is primarily one of sustenance for the injured and his dependents while he is disabled as a result of his injuries, or of support for the dependents of a workman who meets his death by reason of an industrial fatality. The problem in its ramifications soon leads into the whole field of social insurance, for when considering the destitution caused by industrial accidents attention is inevitably directed to the closely related subject of occupational diseases, and then to provision for workers worn out by lives of toil and for the dependents of such

quently made by economists and social workers. Investigations of this nature are usually confined to particular industries or particular localities, so they are not general in their scope, but their value must not be underestimated in the general study of the subject.

[1] For a most excellent, concise and available summary as to the causes of industrial accidents see chapter V of Rubinow's *Social Insurance.*

deceased workers for whom the deceased have been able to make no provision during their lifetime. This brief study must be confined as closely as possible to the subject of industrial accidents in its relation to employers' liability, both under the common law system and under the compensation system.

Although the proportion of accidental injuries for which the employer can be held responsible under the common law system is comparatively small, the injured employee instinctively looks to his employer for compensation for his injury or for assistance during his disability, and if compensation or assistance is refused he then considers whether or not he has any legal redress against his employer and if he decides to enter suit the employer is compelled to come into court and defend. Litigation is essentially antagonistic in its nature, for one party is attempting to establish a right which the other denies, and the great volume of employers' liability litigation has engendered a spirit of hostility between employers and employees, for in order to establish or defeat alleged rights facts must often be distorted and it seems in reviewing many employers' liability cases as if many must have been won by testimony which must have been perjured. Even if there is no suspicion that perjured testimony will be produced in a case, the natural sympathy of a jury for an injured plaintiff is a factor which must be taken into consideration. The result is, therefore, that recovery is often had in cases in which, according to the best evidence that could be obtained by defendants prior to trial, no recovery seemed possible.

Inasmuch as the legal rights which an injured employee has against his employer at common law afford no redress in the greater number of cases, and the question of support for the injured and his family during his disability, and for

his dependents in case of death as a result of the injury, was a pressing social and economic problem, different methods were from time to time devised to mitigate the financial effects of these casualties. As the matter of protection against such misfortune through accumulations prompted by individual foresight is a negligible factor, because of the inability of the average employee to save from his wages, so the problem is one of collective action through insurance of some sort, and the different methods of insurance by voluntary action will be outlined in the balance of this chapter. This action may be taken wholly by the employee, by co-operation of employer and employee, or wholly by the employer. The methods considered will be those adopted without any legal compulsion, and which, therefore, have no effect on the right of the employee to bring action against his employer if he desires to do so, even though the insurance benefits may have been provided wholly at the expense of the employer.

Before discussing the matter of the protection of the employee it may be well to make mention in the way of a brief explanation of a method adopted by many employers for the protection of their liability, and that is by liability insurance. The function of this branch of underwriting is to protect the legal liability of an assured when claims are made against him for injuries alleged to have been sustained by reason of his negligence. In pursuance of this function the general field of liability underwriting is divided into two branches, employers' liability insurance and public liability insurance. The former, as its name implies, is that branch which assumes the obligations of an employer for his legal liability to an injured employee; the latter assumes the obligations of an assured for his legal liability to persons not employees who may allege injuries because of his negligence.

It is only with the insurance of an employer's liability that we are here concerned.

The purpose of liability insurance in its inception was to indemnify the employer for damages for which he may have been held liable to injured employees, but as this form of insurance was applicable in cases where the relation of employer and employee did not exist the liability contract was soon adapted to the protection of the legal liability of the assured in a great variety of situations. Its inception may be attributed to the passage of the Employers' Liability Act in England in 1880, for it was supposed that this legislation increased the liability of the employer to his employee to such an extent that protection of that liability by insurance was necessary. Liability underwriting was begun in England shortly after the passage of that act, and it was introduced in the United States a few years after its inception. The spread of employers' liability insurance was gradual at first and rapid later. In some localities the practice of employers in thus protecting their legal liability was almost universal, while in other localities it was limited, for as there was no legal compulsion on the employer to thus protect himself it was optional on his part whether to do so or not, and his attitude towards the exercise of this option depended largely on local conditions. In localities where there was a considerable volume of employers' liability litigation the practice of insurance was pretty general, while in those localities where litigation of this nature was infrequent the necessity of liability insurance was not so apparent and the practice was not so general.

The purpose of the liability contract in its relation to the common law system of employers' liability, and to the law of Negligence generally, is to indemnify the assured when he has been compelled to respond in damages, and not to insure

the payment of a judgment to a successful plaintiff. This principle in the theory of liability underwriting is mentioned, and it must be mentioned with emphasis, because of its influence in the matter of the underwriting of the obligation imposed on employers by the compensation system. As this lack of certainty as to the payment of a judgment was one of the defects of the common law system, so the element of certainty of payment of compensation benefits is one of the cardinal principles of compensation, and no compensation system is complete which does not provide for the security of the payment of the obligations which it imposes. A great deal of the controversy over the introduction of the compensation system in the different states of the United States has centred around the different methods of security which should be provided for the payment of compensation. This phase of the subject is discussed with some detail in another chapter.[1]

In practice liability insurance often compensates injured employees in cases where otherwise nothing would have been paid to them. The insurer in a liability contract undertakes the obligations of the assured within the limitations of the contract, and when an accident has been duly reported it is optional with the insurer after a claim for damages has been made to settle or to contest. Frequently a liability company will settle claims without merit in order to avoid litigation, and will settle doubtful claims to avoid the uncertainty of litigation, and this is often done in cases where the employer would have fought the case to the limit if he had not been protected by liability insurance. While, however, the liability contract as written to protect the common law obligation may operate for the benefit of an injured em-

[1] See chapter VIII, *The Insurance of the Compensation Obligation.*

ployee in certain individual cases, it cannot be claimed that it was any general solution of the financial and social problem of the industrial accident, for it was written primarily for the benefit of the employer rather than that of the employee, and any benefit that the employee may have received from it was only incidental.

Protection by means of accident insurance which is carried for his benefit may afford the injured some mitigation against the financial effects of an industrial accident. Accident insurance is that branch of underwriting which was devised to indemnify the assured in case of injuries sustained by accident, and its purpose is to afford indemnity to a policyholder who has been disabled because of an accidental injury. In its simplest form the accident contract is an agreement between the insurer and the assured, for a financial consideration paid by the assured, to pay to the assured certain amounts of money if the assured sustains injuries by accident during the policy period, unless, perchance the circumstances of the accident may bring the case within some of the exceptions in the policy, if there are any limitations in it. This is the substance of the accident contract when it is made between the insurer and the individual assured. It may become more complex when in its application to the relation of employer and employee the interest of the employer enters into the transaction, for if the employer pays all or any part of the premium in order to secure this protection for the employee his interest must be considered.

Accident insurance is one of the underwriting developments of the industrial era. Although the idea of accident insurance seems to have originated almost simultaneously in England and the United States during the latter part of the first half of the nineteenth century it was not put into

practical operation in the United States until some years after its inception in England, so the credit for its origin must be given to England while that for its development belongs to this country.

In its inception accident insurance was devised to afford indemnity in cases of accidents sustained during the course of railway travel, and its inception is almost simultaneous with the inception of this form of transportation. The hazards to which a person was exposed in connection with travel on steam cars were so apparent, in contrast to the comparative lack of danger in other forms of transportation, and the means of protection against such accidents were so limited, that it was considered that the passenger was in need of such indemnity and so this form of underwriting was devised. At the time of its inception the dangers of accidental injury were more apparent in connection with railway travel than with any other form of activity, but as time passed and as the conditions of living and industrial conditions changed, and as the percentage of accidents from railway travel became smaller and smaller in proportion to the whole number of accidental injuries, the necessity of accident insurance protection for accidental injuries from any cause became more and more apparent, so the accident contract was broadened to cover accidents which resulted from any dangers to which the assured might be exposed.

The different methods in which accident insurance is conducted must be considered, and it may be said that there are two general methods, insurance by stock companies and by mutual associations. The difference in the names indicates the distinction between the methods. The stock company makes the contract with each individual assured, and its capital stock and other assets are all pledged to the fulfilment of each individual contract independent of any further

premium payments on the part of the policyholder, while in the mutual association there is no capital stock, the different members being in fact the stockholders, and if the assets are insufficient to liquidate the outstanding obligations of the association the members are liable to assessment in order that the payments may be made.

The stock companies are practically uniform in their structure and purpose, in that each has its specified capital and conducts its business for the profit of its stockholders the same as any other business corporation, while the mutual associations are conducted only in the interest of the members who compose them, and any profits that may accrue from their operation belong to the members. Many diversities appear in mutual organisations, both as to size, the character of their business, and the manner in which it is conducted. Some mutual companies may have little to distinguish them from stock companies except the fact of mutuality, for they may conduct their business on the same plan and over a large area, while others may be confined to a special class of risks or to a limited area. They may be formally incorporated, or they may be merely voluntary associations; they may be adjuncts of fraternal organisations, or they may be entirely independent of any such organisations; and many other diversities may appear in their scope and operation which cannot be enumerated here. These suggestions are intended to show only some of the chief diversities in the organisations for the conduct of accident insurance which are based on the principle of mutuality rather than that of profit for stockholders.

In scientific accident underwriting the premiums which must be paid for accident insurance protection vary according to the occupation in which the assured is engaged. The practical situation is recognised that in some occupations a

person is exposed to greater dangers than in others, and this method of graduating the premiums according to occupational hazards is the only feasible method of distributing the hazards that has as yet been devised. The different classifications in accident underwriting are graded, in a general way, according to the dangers incident to the different occupations in which policyholders are engaged, the theory being that each classification should bear its own losses, and that those insured under one classification should not be called on to pay any part of the losses of any other classifications, particularly the losses of a more hazardous classification. The basis of the classifications, generally speaking, is the proximity to dangerous machinery, the exposure to dangerous manufacturing processes, or employment in work which from its nature and surroundings may appear to be particularly dangerous.

The result of this practice is that the price of this protection is practically prohibitive to those who need it most. The person who is engaged in an occupation which involves little or no occupational dangers can purchase a comparatively large amount of accident insurance for a comparatively small premium, while as to the person in an occupation which involves a large amount of occupational dangers, and who, therefore, needs accident insurance much more than the person who is exposed to little or no occupational danger, the situation is just the reverse. He must pay a comparatively large premium for a comparatively small amount of protection. Another factor in addition to the high cost which makes accident insurance as conducted on a scientific basis almost ineffective in its relation to those engaged in hazardous occupations is the fact that as the occupational hazards increase the amount of accident insurance which a company will write for any individual policyholder decreases. While the amount that will be written for a policyholder in a non-

hazardous occupation is almost unlimited, the limit is successively lowered as the dangers in the occupations increase, so that in the most dangerous occupations the limit which a company will take is very small, if in fact any insurance at all will be written for persons engaged in those occupations.[1]

In order to afford some relief against this practice of many of the companies of virtually eliminating the business of the hazardous classifications, companies have been formed which specialise in the business of extending accident insurance protection to workingmen. The business conducted by these companies goes by the name of "industrial accident insurance." While the principles on which these companies conduct their underwriting are identical with those on which

[1] An interesting exception to this attitude of many of the accident companies of not soliciting business among those engaged in hazardous occupations is found in the so called "four period" or "pay order" policies. This is a method in which the co-operation of the employer is enlisted in securing the accident insurance of the employee. Permission is obtained from the employer to solicit the employees individually for accident insurance, but the employee instead of paying the premium as a whole is permitted to give orders on his employer for its payment in instalments, usually in four payments, from which custom the names applied to this form of insurance are derived. The contracts are made with each individual employee and not with the employees as a whole, and it is entirely optional with the employee as to whether or not to insure when he is solicited, the employer taking no part in the matter except to sanction the solicitation and honour the orders for premium payments given by the employee.

While this form of accident insurance and the method of solicitation is adaptable to any form of industry, it has been written particularly among railroad employees, and it is interesting to note this fact in its historical bearing, for as accident insurance was first written to afford some protection against the hazards of railway travel, so the necessity for this form of protection has always been closely associated with that class of dangers, and the protection of railroad employees has been developed, both by stock companies and by mutual associations, to a greater extent than has the protection of the employees of any other line of industry.

the business of the other companies is conducted, their business practices are distinctive in that they cater particularly to the business of workingmen and the matter of premium payments is made easier and more convenient for their policyholders than in the other companies. The classification of occupations according to hazards is preserved, but instead of graduating the premium according to the different classifications the premium is uniform and the benefits are graded according to the occupation of the assured. The policy may be secured by the payment of a policy fee and the first instalment of the premium, and then at regular intervals, say monthly, the agent calls and collects the subsequent instalments; for these payments the assured receives certain benefits in cases of accidental injury, and the benefits vary in amount according to the hazards of the occupation in which the policyholder is engaged. A person engaged in a more hazardous occupation would receive less than a person engaged in an occupation classified as less hazardous.

There are many different ways in which accident insurance protection for employees can be provided by the joint action of employer and employee, or by the employer alone. While, of course, there is nothing to prevent the payment of the premium by the employer for an accident policy on each individual employee this practice has never become general, for when the employer pays all or any part of the premium for accident insurance for his employees the contract is usually written in a collective form. This form, which is known as the "workmen's collective policy," is a contract made between the insurance company and the employer for accident insurance for his employees as a whole, the premium charged being a percentage of the total pay of the employees covered and not a specific charge for each employee, and the rate varying according to the occupational hazards of the differ-

ent lines of business in which the employer is engaged. Contracts of this nature are written to cover only occupational accidents or both occupational accidents and accidents which may happen to employees while not engaged in their regular work.[1]

While the workmen's collective policy is a contract between the employer and the insurer, and the employer is therefore responsible for the premium, there is nothing to prevent the employer by agreement with his employees from deducting a proportional part from the pay of each employee for this protection, so that it may result that the employees themselves are paying the full amount of the premium, the insurance standing in the name of the employer merely as a matter of convenience. It may be, however, that the employer deducts only a part of the premium from the pay of the employees and pays the balance himself, or that he pays all of the premium without any contribution from the employees. The policy is for the benefit of each individual employee, and pays specific benefits to him direct when he is disabled by accidental injuries within the provisions of the contract.

[1] This distinction in the underwriting of workmen's collective policies emphasises the fact that of all the accidents that happen, particularly to insured risks, comparatively few arise from occupational hazards. While these observations about accident insurance concern the subject especially in its relation to the industrial accident, the fact must be considered that in its general application accident underwriting plays a much more important part in affording protection for non-occupational accidents than for occupational accidents. The claim payments of the different accident companies support this assertion, for it may be stated that of the claims paid by companies doing a general class of business approximately two-thirds of the payments are for non-occupational accidents and one-third for occupational accidents. This proportion may vary in different companies, particularly between the industrial companies and those which do no business on the industrial plan, for with the industrial companies the proportion of claims on account of injuries sustained in occupational accidents is necessarily larger than it is with the other companies.

The effect, therefore, is just the same as it would have been had a separate policy been issued to each individual employee.

In considering the workmen's collective policy it should be noted that as a matter of practice the policy is issued only in connection with a policy covering the legal liability of the employer for injuries to his employees. It is an adjunct of liability insurance rather than an independent piece of underwriting. A policy of this nature may affect the experience of an employer under his liability policy, for if an injured employee receives regular benefits during disability which he knows that the employer furnishes in whole or in part, he is not as likely to make claim against his employer for damages as he would be were he in receipt of no benefits from him. In recognition of this some reduction in the rate charged for employer's liability insurance is usually allowed when a concurrent workmen's collective policy is written.

The methods in which accident insurance protection is extended to workingmen by mutual associations, other than accident companies which do business on the mutual plan, are so various that little can be done here except to mention the fact of such protection by associations of this nature. Two general divisions might be made in attempting to classify these associations, and that would be by dividing them into associations connected with the trade or business of the assured and those which have no connection with his trade or business. Each class could be further divided into two general classifications. The trade associations may be confined to one particular establishment or to the employees of one employer, or they may include workmen engaged in a particular occupation for many different employers. Those which bear no relation to the trade could be divided into those

which do business on a fraternal basis, or as adjuncts of fraternal organisations, and those which are conducted on an assessment basis without any fraternal features.

Many employers, particularly the railroads and other large corporations, have encouraged the formation of benefit associations among their employees for the purpose of affording financial relief in cases of disability however caused, so that the relief afforded is not confined to cases of accidental injury but may also include disability caused by sickness. The premiums or assessments which support the benefits may be paid by the employees alone, and the associations managed by them, or the employer may contribute, in which case he usually has a voice in the management.[1] The associations which include persons engaged in a particular occupation but employed by different employers are usually or-

[1] An interesting ramification of this practice of some employers of furnishing accident insurance in whole or in part for their employees is the effect that the acceptance of such benefits may have on the right of the employee to recover damages from his employer for accidental injuries. When it is shown that this protection has been provided wholly at the expense of the employees, even though the employer may have been the medium through whom the negotiations were conducted and the insurance written in his name, this question cannot arise, for there is no consideration which would support a waiver of the legal rights of the employee, but when the employer contributes to or supports insurance in any way, either in regular companies or in trade benefit associations, there is a consideration to support such a waiver, and the waiver is usually required as a condition precedent to the acceptance of the benefits.

At common law the courts generally have held that such waivers are valid, and have allowed them to be established in bar of negligence actions brought by injured employees who had previously accepted such benefits. In some states the matter has been regulated by statute, the statutes generally providing that the employer is relieved only to the extent of the proportion of his contribution to the benefit funds. For a résumé of the law on this subject see pages 754–788, *Workmen's Insurance and Benefit Funds in the United States*, (Twenty-third Annual Report of the Commissioner of Labor, Washington, 1908) and pages 146–149, *The Law of the Employment of Labor*, L. D. Clark.

ganised, supported and managed by those who are insured, the employers paying no part of the premium, and consequently having no part in the management.

The accident insurance feature of fraternal orders and the assessment organisations which are carried on independent of any trade or business are supported wholly by the members, so the employers of employees who may be members have no interest in them, but they are of inestimable value to their members, who are principally wage earners, in times of misfortune and they must be mentioned in connection with the institutions which serve to lighten the financial burden caused by industrial accidents. The insurance feature of a fraternal order or insurance which is written on the assessment plan may not be conducted on a scientific basis, so that many who have contributed to relieve the misfortunes of others may find themselves without protection from these sources when they become victims of similar misfortunes, but their value to members who receive benefits while these organisations are fulfilling their obligations is real so reference must be made to them in connection with the other agencies which serve to mitigate the misfortunes of the industrial accident, but this reference to them is merely to mention their existence and their value without attempting to outline the plans on which any of these organisations are conducted.

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CHAPTER III

EUROPEAN BACKGROUND

The different problems, both legal and economic, raised by the industrial accident had been considered in Europe long before the agitation in the United States had crystallised on any programme of reform in our system, and different methods had been adopted for mitigating the misfortunes which it caused, so it was but natural that those who were interested in the subject in this country should consider the solutions suggested by other countries when attempting any change in our own nation. While practically all of the nations of Europe had adopted some system of compulsory insurance for workingmen, or some other system for their compensation in cases of accidents caused by the hazards of industry which was a radical change in pre-existing conditions, prior to the close of the nineteenth century, and while it is interesting and instructive to note all of the different systems which have been adopted in the civilised nations, it is with the systems of two nations, Germany and England, that we are particularly concerned when we study the European background for the different systems which have already been adopted in the United States, for those two systems have received more study on the part of our economists, publicists and legislators in the consideration of the solution of our problems than have the systems of any other nations. Only the briefest outline of the basis of the German and

English systems can be given here, but their distinctive features can and will be noted.

The general distinction in the origin and administration of these two systems should be noted before giving any outline of either of the systems. Superficially speaking it may be said that the German system owes its origin to the genius and constructive statesmanship of Bismarck, who forced the legislation through in order to stem the rising tide of socialism in Germany, while the English system is the result of long popular agitation for a legal change which was necessitated by previous economic and social changes. In their administrative features the differences in the systems are also radical, for the German system is a strong compulsory insurance system, while the English system simply prescribes the obligations of the employer without specifying any requirements as to security for the performance of the obligations, and it does not provide any administrative features other than court procedure. The fundamental differences, in brief, both in origin and administration are those between an autocratic and a democratic form of government.

The German system originated as a comprehensive social insurance system, and although the whole system was not enacted and put into operation by one piece of legislation the component parts of the system were all established within such a short time that the interval between the enactment of the laws creating the different parts which together constitute a comprehensive system was negligible, for the whole reform was accomplished inside of a decade by masterly imperial direction. The English system, on the contrary, is the result of long popular agitation for a change in existing conditions, and starting as a limited compensation law for certain classes of industrial accidents it was extended to cover all such accidents to employees, regardless of the na-

ture of the occupation, and it appears to be expanding into what will result in a comprehensive programme of social insurance, by a series of legislative enactments which are not in terms extensions of the compensation law but are parts of the general social system originated by the adoption of the compensation principle. While, therefore, the two systems may possess these fundamental and basic differences in their origin and development, the ends which they seek to accomplish are in effect identical.

The different conceptions of the attitude of the state towards the citizen, and of the functions of the state in general, are the factors which were responsible for the differences in the origin of the insurance system of Germany and that of the compensation system of England, for according to the German conception the adoption of any such system, when its necessity is shown, is only a logical and legitimate extension of the imperative duty of the state to further the welfare of all classes by the necessary legislation, and it could be justified on that ground alone, while the adoption of any such legislative principle in England involved a repudiation of the individualistic principles of the common law and of the theoretical basis of economics as recognised by the early English economists who had such a large influence in shaping the doctrines of the science in England. Thus the progress towards the adoption of such protective principles for any one class was necessarily slower in England than in Germany, for in the one nation it involved the repudiation of existing and settled doctrines, while in the other it was only the extension of principles already recognised.

The logical difference, therefore, in the origin of the German system and the English system was that in Germany the system was originated and virtually forced to adoption by strong imperial authority, while in England its adoption

was in response to popular demand. In Germany the genius and insistence of Bismarck was responsible for the formulation of the programme of social insurance which was adopted in order to anticipate the demands of the socialists and appease any elements of discontent that might become manifest among the working people, while in England a responsible ministry representing the popular will first demanded the enactment of a compensation law which was limited in its scope, and then had its scope extended as it was seen that it was inequitable to attempt to differentiate among employees and give the benefit of this protection to some classes and deny it to others.

While upon a superficial examination it may appear that the adoption of the social insurance system of Germany may be attributed to the genius and constructive statesmanship of Bismarck, a deeper study of the subject will show that for many years forces had been at work in this direction, that the adoption of the system was a consummation, and that the work of Bismarck was that of direction rather than that of creation. The system is essentially socialistic in its nature, and so it is the consummation of the ideas of the socialists whose influence has been so strong in Germany. While the name of Karl Marx is more intimately associated with the mention of German socialism than that of any of the other leaders, many of the ideas which constitute the basis of the socialistic propaganda are those of other leaders, and this idea of the protection of individuals and their families against the consequences of crushing misfortunes is attributed to LaSalle rather than to Karl Marx. He recognised the function of the government to protect the individual against force and fraud, but in addition to this he contended that it was the function and the duty of

government to protect against other misfortunes the consequences of which might be just as real.

The legal situation in Germany in its relation to negligence actions between employer and employee prior to the adoption of the social insurance system was much the same as it was at common law in England and the United States. The liability of the employer for injuries sustained by the employee during the course of employment was predicated on the idea of fault on the part of the employer, and the employee could not recover unless he could show the fault of the employer. The situation in its practical aspect prior to the establishment of the German Empire was much the same as it is at present in the United States, for each separate kingdom dealt with the subject in its own way and no uniformity was possible. When the nation became united at the close of the Franco-Prussian war the situation was altered in this respect, for the empire assumed jurisdiction over this subject and the legislation on it could be uniform throughout the empire.

Prior to the formation of the empire the different German states had enacted considerable legislation regulating the relation of employer and employee which was of a protective nature for the employee, and after the formation of the empire, in 1871, a general act in the nature of an Employers' Liability Act was passed which was applicable to the nation as a whole, but this law was limited in its scope and unsatisfactory in its operation. It did not apply to all classes of employees but only to certain classes, and as liability could be established only when negligence was shown litigation was often necessary in order to secure compensation, so it was unsatisfactory to the employees to whom it did apply. The uncertainty as to liability made it unsatisfactory to employers,

and the large awards made when liability was established ruined many small employers, so the law was unsatisfactory to the employers as well as to the employees, and both classes demanded relief.

The different states which compose the German Empire had encouraged and some had required the formation of societies to insure workmen against sickness before the empire was established, and some of the organisations which were perfected in accordance with either the authority or the command of the state had also included insurance against accidents within the scope of their operations. After the establishment of the empire and before the adoption of the compulsory insurance system the functions of such societies were defined by legislation, which legislation also fixed the rates of contributions and benefits, and provided for the security of their funds. These societies as established in the different states provided more for sickness than for accidents, and the societies authorised by the empire provided for sickness alone, so they failed to provide for many of the misfortunes of the working classes, and by the time that the adoption of the compulsory insurance system was proposed it had been shown that the insurance provided by the voluntary associations under the authority of the empire was insufficient for the necessities of the time. Nevertheless the establishment of these societies was a valuable precedent for the action which was taken.[1]

The political influence of the socialistic party extended rapidly after the formation of the empire, and the increase in the number of socialistic votes in the Reichstag was soon

[1] For brief and comprehensive accounts of the conditions in Germany prior to the adoption of the compulsory insurance system see chapter I in *Compulsory Insurance in Germany*, J. G. Brooks; pages 980–988, *Workmen's Insurance and Compensation Systems in Europe;* and chapter I, *Social Insurance in Germany*, W. H. Dawson.

noticeable. With the inauguration of a strong, central legislative body the socialists had a better opportunity for the spread of their principles and the display of their activities than they had had in the individual states, and with the spread of their propaganda certain evidences of social unrest became manifest, so that Bismarck appealed to the Reichstag for repressive legislation but without effect. About this time two unsuccessful attempts on the life of the aged Emperor William I caused Bismarck to abandon his appeals to the Reichstag and appeal directly to the people for a new Diet which would be responsive to his wishes, and the people granted this request and a new Reichstag was elected. When the first repressive legislation was enacted by this body it carried with it a promise for social reforms, as a result of which the first Accident Insurance Bill was introduced in the Reichstag in 1881. Thus the policy of attempted repression was changed, and for it was substituted a well defined program of social reform for the welfare of the working classes, fostered and forced by governmental action.

The German social insurance system was in its inception made up of three component parts, the Sickness Insurance system, the Accident Insurance system, and Insurance against Old Age and Invalidity. Bismarck first introduced the Accident Insurance Bill in the Reichstag, but for various reasons his attempt to have this enacted as the first piece of legislation in the establishment of the system was abandoned and the Sickness Insurance system was the first to be established. This law was passed in May 1882, and it became effective in the latter part of 1884. The reason for the failure to pass the Accident Insurance Bill first was, in brief, that the amendments to Bismarck's different proposals were unsatisfactory to him and no basis of agreement was reached, and a practical consideration which may have contributed to

the passage of the Sickness Insurance Bill was the fact that sickness insurance was already more general than any other form because of the encouragement which the different German states had given to it before the establishment of the empire, and also the sanction which the empire had given to sickness insurance by the legislation passed in 1876. Another consideration was the fact that in the Sickness Insurance Bill as demanded and passed the employer contributed one-third of the funds necessary to support the system and the employees contributed two-thirds, so that the burden of the support of the system was on the employees. The Accident Insurance Law was passed in 1884, and became operative October 1, 1885. While this law was limited by its terms it was not so restricted but what it extended the necessary relief to a large class of workmen, and by subsequent amendments it was made practically universal in its application. The Act for Insurance against Old Age and Invalidity was approved June 28, 1889, and completed the trio of the laws which constitute the component parts of the social insurance system. These laws were consolidated and codified, and extended in their scope, by the Insurance Consolidation Act of 1911.

The popular conception in this country regarding the German Social Insurance System is that it is a state insurance system, but this conception is to a certain extent erroneous and it should be corrected. With the exception of certain provisions made by the state for the support of the Old Age and Invalidity pensions established by law the government makes no contributions to the insurance funds. The system is, rather, a compulsory insurance system, for the law requires that the payment of the benefits provided by the different systems shall be secured in some specified way. The plan was to recognise and utilise existing institutions as far as possible, and to authorise the formation of new institutions

where no existing institutions were available to execute the provisions of the law, so that the system did not usurp the functions of any of the existing institutions for Sickness Insurance but extended them, and where any institutions were available for Accident Insurance they were also utilised, but where no such institutions were available it was necessary that they should be created. Thus the law simply recognised the principle already in operation and compelled its extension to situations for which no provisions had previously been made.

It was undoubtedly easier to secure the passage of the law providing for compulsory Sickness insurance than it was to secure that for Accident insurance because of the fact that disability caused by sickness was older and more familiar to every one than that caused by industrial accidents, and insurance against this form of disability was already very common, so that the application of the principle of compulsory insurance for disability caused by sickness was only an extension of a practice already prevalent by voluntary action. Another factor which contributed to the passage of this law in the way of quieting any opposition that employers may have had to its enactment, was the provision that the larger share of the contributions for the support of the insurance funds should come from the employees themselves. The Accident Insurance System, however, contemplated that the whole cost of insurance should be on the employers, so this fact together with the fact that the system was a radical departure in principle from the existing system may have delayed the enactment of the law providing for its establishment.

Although the Sickness and Accident funds were established by separate legislative enactments, and the organisation and administration of the funds are separate, yet they are closely allied in their administration and the Sickness funds assume

a part of the obligations which are upon the Accident funds in other countries. The administration of all of the funds is a complicated procedure, because of the mass of specific details in the different laws and also because of the minute supervision exercised by the German government over the care and distribution of the funds, so nothing but the barest outline as to their administration can be given here, and that outline will be confined principally to the nature of the organisations which administer the funds, the sources of the contributions which support the funds, the benefits allowed, and the methods of administration.

It has already been stated that the German law made use of existing institutions as far as possible in the administration of the social insurance system, requiring that the benefits paid by the different funds already in existence, which were recognised as mediums through which the new system could be administered, should be at least those fixed by the law. The different Sickness funds were so well organised and established that when Sickness insurance was made compulsory the existing funds were so adapted to carry on the work that the establishment of only two new funds was necessary. The existing institutions recognised by the law were the miners' funds; the factory and work funds; the guild funds; and two classes of mutual funds, those registered under the law of 1876 and those established under the laws of the various states. The new organisations were the local funds, of which there were two general classes, those formed for special trades or for various trades carried on in the same locality, and building works funds formed for special works of construction where exceptional risks were incurred and where the work was of a temporary nature, and a system of parochial insurance under which the local authorities were required

to insure any persons who came under the law and were unable to join any other fund.

Under this system Sickness insurance was furnished by a very large number of different funds, so that when the Insurance Consolidation Act of 1911 was passed one of the provisions was for a greater centralisation of these funds with a view to superseding the small and inefficient funds. Under this law two groups disappear entirely, the building trade funds and the parochial funds, which constituted more than one-third of all of the funds in existence in 1910, and two new types were established. The funds recognised under this law were the general local funds; the factory and work, and guild funds; the miners' funds; the rural funds; and the mutual aid funds.[1]

The inference may be drawn from the name that the Sickness Insurance System provides only for disability caused by sickness as distinguished from that caused by accident, and that there is no connection between this system and the Accident Insurance System, but this is wrong, for the Sickness Insurance System is the basic system and the Accident Insurance System is an adjunct of it. The Sickness system, in the first instance, provides for all cases of disability, however caused, whether by sickness or accident, and the Accident system comes into operation only when disability caused by accident lasts beyond the time for which payment from the Sickness system is provided.

The burden of the support of the Sickness funds is on the employees themselves, the employers contributing one-third of the amount necessary and the employees the other two-thirds. The minimum benefits in cases of sickness are fifty

[1] See pages 33–38, *Social Insurance in Germany*, W. H. Dawson, for a brief description of the various Sickness Insurance Funds.

per-cent of wages during twenty-six weeks of disability, and in addition to this the necessary medicine and medical attendance. In cases of disability caused by accident the injured receives the same indemnity from the Sickness fund during the first thirteen weeks of disability, and from the fifth to the thirteenth week, inclusive, an additional sixteen and two-thirds per-cent paid by the employer in whose service the accident occurred; after the thirteenth week the payments are made from the Accident funds.

The larger proportion of the accidents which happen to workmen during the course of their employment involve disability of thirteen weeks or less, so that the greater number of injured employees are compensated from funds to which they themselves have contributed the major part. This does not mean that the employees bear the larger share of the burden of Accident Insurance, for in the serious cases the payments for the disability beyond thirteen weeks, and in fatal cases the payments to the dependents, come from the Accident funds, and these payments constitute a much larger part of the total amount paid for accident indemnity than that which comes from the Sickness funds.

As the employees bear the larger share of the contributions to the Sickness funds, they have a proportionally greater part in the administration of the funds. The general administration of each fund is carried on by a board of directors and a general meeting. The directors are elected by the general meeting, which in the small funds consists of all of the adult members but in the large funds must consist of delegates, the employers having their proportional representation in the general meeting and on the board of directors. The directors have general executive authority. Each fund is also subject to the jurisdiction of the authorities who have supervision of the conduct of the business of insurance.

When the disability caused by accident lasts over thirteen weeks the Sickness fund is relieved of any further payment and the payment for the additional disability comes from the Accident fund in which the employer of the injured employee is insured. The Accident Insurance System is a non-contributory compensation system, for the employees are required to bear no part of the support of the funds from which the payments are made. In theory this system is a limited compensation system, for it is applicable to certain specified trades and undertakings, but as a matter of fact the classifications are so broad and inclusive as to make the system practically universal in its application, for with the exception of the handicrafts and small trades, the home industries, and commercial undertakings, all wage earners engaged in industrial employments are included.

The compensation paid in non-fatal cases is two-thirds of the wages of the injured, during the period of total disability; during partial disability the payments are proportionally less, being graduated as near as possible to compensate for the impairment in earning power before the accident and after it. In addition the injured is entitled to receive the necessary medical and surgical attention at the expense of the Accident fund. In fatal cases an allowance is made for funeral expenses, and the dependents receive a pension based upon a proportion of the earnings of the deceased, subject to a maximum of sixty per-cent. The insurance required by law to meet the payments is furnished by mutual associations of employers. Some of these associations include only those employers engaged in the same trade, while others may include all employers in a certain area. All of the associations are subject to the supervision exercised by the government over the conduct of insurance.[1]

[1] For fuller information concerning the Accident Insurance System,

The adoption of the workmen's compensation principle in England was preceded by an agitation for the enactment of different forms of labour legislation which had been in progress for a century, or practically from the beginning of the industrial stage, for as soon as some of the conditions which were incident to the factory system became noticeable, and the inability of the workman to protect himself against those conditions became apparent, the agitation was started for legislation to remedy those conditions. In the enactment of the different forms of labour legislation in England the laws regulating the working conditions of the employees, which may be classed under the heading of factory legislation, preceded the laws which relate to the legal liability of the employer for accidents to the employee sustained during the course of employment. The labour legislation of England during the nineteenth century did not follow any well defined legislative or social program, but each enactment was aimed at some specific evil regardless of any other evils that might exist, so that while the end of the century saw a well regulated system of factory legislation and the adoption of a system of workmen's compensation this legislation had its inception piecemeal and in an exceedingly haphazard way.

It has already been noted that the fundamental difference between the origin of the German system and of the English system is that between an autocratic and a democratic form of government. The force of this observation is apparent when the origin of each system is studied, for it has already been seen that the German Social Insurance System was formulated and adopted as a well defined social program, in

see Chapter IV, *Social Insurance in Germany*, W. H. Dawson; pages 89–115, *Workingmen's Insurance in Europe*, L. K. Frankel and M. M. Dawson; and pages 975–1176, *Workmen's Insurance and Compensation Systems of Europe.*

an extension of the recognised function of the state to further the welfare of all of the citizens. The English Workmen's Compensation Act may be regarded as the forerunner of a similar system in England, and the countries whose legal and economic systems are similar to that of England, and while the results accomplished may in effect be practically identical with those accomplished in Germany, the differences in the inception and in the basic political and economic theories in the two countries are radical. The conditions, both political and economic, are so similar in England and in the United States that the history of labour legislation in each country has many similar features, the United States following England in many of the legislative experiments adopted in that country.

The labour legislation passed in England during the first eighty years of the nineteenth century had little or no bearing on the liability of the employer for occupational injuries sustained by his employees; its principal concern was with the regulation of working conditions and hours of labour, and with the regulation of labour organisations. The rapid growth of the factory system and the absolute lack of any regulation as to the conditions of employment or of working hours soon resulted in a situation for which legislative relief was demanded, so that factory legislation had its inception early in the nineteenth century, but it was many years before the proper legislation was passed with the necessary provisions for its administration and enforcement to give it the effect that it was intended that it should have. This legislation was directed against the employment of young children in the factories, to the procurement of proper living conditions for apprentices, and to the limitation of the hours of labour for women and children employed in the factories. In their opposition to this legislation the employers were backed by the

political and economic theories of the time, based on the assumption of the freedom and independence of all individuals and the resulting corollary that the government should not interfere in the management and control of private affairs. An absolute repudiation of this theory was necessary before any substantial progress could be made. The legislation relating to labour organisations is a phase of the subject that has so little connection with that relating to the liability of the employer for injuries sustained by the employee that it is mentioned in this connection simply as a part of the general subject, and without any description or comment.[1]

The first legislation in England to make any change in the common law of employers' liability was the so-called Employers' Liability Act of 1880. The distinguishing feature of this law was that it changed the fellow-servant rule by establishing a legislative recognition of the vice-principal rule, and made the employer liable to his employee for injuries sustained by reason of the negligence of an employee who served the employer in a representative capacity. This legislation was preceded by several years of agitation, and a number of different bills were introduced in Parliament in the meantime the purpose of which was either to abolish or modify the doctrine of common employment. When first passed the Employers' Liability Act was limited in its operation to a term of seven years, but it was subsequently extended from year to year and still remains in force except as superseded by the passage of the Workmen's Compensation legislation.

The first Workmen's Compensation Act in England was passed in 1897. The act was limited in its scope, and although the undertakings to which it applied included all

[1] See *A Short History of Labor Legislation in Great Britain*, A. M. Low, Bulletin of the Bureau of Labor (Washington), Vol. 14, pages 534–578 (May, 1907).

which might be classified as "hazardous," and it was doubtless the intention of the framers to distinguish in a general way between hazardous and non-hazardous occupations, no such specific distinction appears in the law. The act was amended in 1900 so as to include agricultural operations, and it was amended and re-enacted in 1906 so as to make its application practically universal.

The law applies to "personal injury by accident arising out of and in the course of the employment" of a workman, and in addition to this coverage a schedule of occupational diseases is included in the act naming a number of different diseases and the processes in which they occur, and it is specified that those diseases if contracted in the processes named shall be included in the coverage of the act. The law also provides that the Secretary of State may make orders extending the scope of the act so as to cover other diseases and processes, and the coverage has been considerably extended by the exercise of this authority.

A loophole of considerable size is left in the law by the provision allowing the employee to elect his remedy in case of an injury caused by the "personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible." By virtue of this provision the injured employee has his common law rights preserved in cases of injuries caused by the "personal negligence or wilful act" of the employer himself, and his rights against the employer under the Employers' Liability Act for injuries caused under the same circumstances by a personal representative of the employer. The employee must elect, in all such cases, either to take his compensation or to proceed independently of the act, but if his common law action fails the court may allow him compensation under the act subject to a deduction for costs in the unsuccessful suit.

As the employee has his rights as they were before the passage of the act in cases of wilful negligence on the part of the employer or of any one representing him, so the employer is exempt from liability under the act in case of injury caused by the "serious and wilful misconduct" of the employee, unless the injury result in death or serious and permanent disablement. It may be said, however, that the attempts on the part of injured employees to hold their employers under the common law because of this reservation in the compensation law are relatively few, and in return the attempts on the part of employers to deprive employees of the benefits of compensation because of alleged serious and wilful misconduct are rare.

The indemnity provided in non-fatal cases is a weekly payment during incapacity not exceeding fifty per cent. of the average weekly wages of the injured, the amount not to exceed one pound ($4.87) a week. This is subject to some variation in cases of partial incapacity, and in the case of an injured minor whose wages do not amount to a pound a week. In fatal cases if no dependents survive the payment is confined to reasonable expenses of medical attendance and burial, not to exceed ten pounds. In cases of total dependency the payment is a sum equal to three years' earnings of the deceased, but not less than one hundred and fifty pounds and not exceeding three hundred pounds. If the dependents are only partially dependent the amount to be paid must be fixed by agreement or arbitration, but it cannot exceed the amount allowed for total dependency.

The matter of the insurance of the compensation obligation under the English act is wholly optional with the employer, for the law makes no provision regarding the security of the payments other than to class compensation claims among the preferred claims in case of the bankruptcy of the employer.

The spirit of the workmen's compensation principle, however, encourages the security of the payments of the obligations by some form of insurance, and several different underwriting institutions were already in existence which could be immediately utilised for that purpose. The law, in fact, recognised the "friendly societies" which had been in existence for several centuries, and provided that substitute schemes of compensation might be allowed under the act when the registrar of friendly societies, after examination, certified that the scheme was not less beneficial to the workman than the allowances of the Compensation Act. This meant that the employers and employees could unite in forming insurance associations, or that they could join those already in operation, the employers paying a sufficient part of the premium to secure the payment of the compensation obligation and the employees contributing any premium that might be agreed upon in order to secure larger indemnity than that allowed by the act. The employer was then liable only in accordance with the provisions of the substitute scheme. Liability underwriting had been started in England shortly after the passage of the Employers' Liability Act, and the liability companies were prepared to insure the obligations imposed by the Compensation Act the same as they had covered the common law obligations. The workmen were protected in case of bankruptcy of an assured employer, for the rights of an employer against the insurer in such a case were vested in them by the law, and the insurer was, therefore, directly liable to them.

Nearly all of the compensation insurance in England is carried in stock companies. Insurance under substitute schemes by joint action of employers and employees has not been very successful or popular, and only a small volume of such insurance is in force. The development of accident

insurance in friendly societies connected with the different industrial establishments has evidently been impeded by the belief on the part of the workmen that this might break down the power of the trade unions, and those societies are now on the decline. The supervision of the stock companies is not as strict in England as it is in many other countries, but they are supposed to carry sufficient reserves to meet all of their liabilities, and it may be said that their assumption of the obligations imposed by the compensation law has been satisfactory.

The act provides for no special administrative machinery in the way of officials whose particular duty it is to administer the provisions of the law, but it is the intention of the law that disputes shall be settled by arbitration, for it is provided in the law that disputes arising under it shall be submitted to arbitration if any committee representative of the employer and employees exists with power to settle matters under the act, or that if either party objects, or no such committee exists, or the committee which exists fails to settle the dispute within six months from the date of the claim, the matter shall be settled by a single arbitrator agreed upon by the parties, or in the absence of agreement by the judge of the county court. It is also provided that in England with the authority of the lord chancellor the matter may be settled by an arbitrator appointed by the judge of the county court, which arbitrator for this purpose shall have all of the powers of the judge. The committee or the arbitrator may, if they or he see fit, submit any question of law to the judge of the county court for his decision, and the decision of the judge either on this submission or in cases where he himself settles the whole question is final unless appeal is taken as provided in the act.

It will be seen, therefore, that it is the intention of the law

to have the matter of its administration vested in the parties or their representatives, and to avoid litigation as far as possible. However, it is impossible to wholly eliminate litigation as long as there is any basis for a difference of opinion among men as to the meaning of a law, so there have been many recorded decisions in England as to the construction of the compensation law, and this collection of decisions has constituted about the only body of precedents that the courts in the United States have had when questions involving the construction of our laws were before them for decision and they were looking for precedents for their guidance.

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CHAPTER IV

THE AGITATION IN THE UNITED STATES

The adoption of the workmen's compensation principle in the United States was preceded by many statutory changes in the common law relating to labour conditions, of which legislation relating to employers' liability was a part. This legislation is comprehended under the general classification of labour legislation, and it includes in its scope all matters relating to labour in which statutory regulation was necessary, either to declare the well established principles of the common law or to modify or abolish common law rules. The greater part of the legislation, however, has been necessitated by the defects of the common law, so the purpose of the bulk of this legislation has been either to modify or abolish common law doctrines.

Before the principle of workmen's compensation was evolved and the idea adopted in any country, the attempts that were made to mitigate the conditions of the employee in relation to his right to recover against his employer for occupational injuries were by the enactment of legislation which either prescribed standards for the conduct of the employer in cases where the standards fixed by the common law were uncertain or indefinite, or modified or abolished the rules of the common law in situations in which such action seemed necessary. As the injustice of the common law system of employers' liability became more and more apparent it was but natural that the attempt should be made to modify

it by statute so that the rights of the employee would be enlarged, and the statutory enactments which were passed were accompanied by a change in public opinion in this matter which manifested itself in a change in the attitude of the courts in the application of the common law in employers' liability cases, and allowed an injured employee to recover under the common law in many cases in which recovery had previously been disallowed in similar cases. A brief review of these statutory changes is an essential element of any study of the subject of workmen's compensation, for they constitute an important part of the movement which resulted in the repudiation of the common law system of employers' liability and the substitution for it of the system of workmen's compensation.

The fundamental difficulty which has confronted labour legislation in the United States is the constitutional difficulty, and this situation appears in two different phases, one of which is more practical than theoretical, while the other relates wholly to constitutional theory. The practical difficulty has prevented uniformity in our legislation, while the difficulty which has its basis in our constitutional theory has gone to the root of the subject and has prevented the passage and execution of legislative enactments unless it could be shown to the legislatures and then to the courts that such legislation was not in conflict with any of the constitutional provisions guarding personal and property rights.

The practical phase of the situation arises from our system of government, in that the different states have general governmental powers except as specific powers have been granted to the federal government, and the federal government possesses only those powers which have been specifically delegated to it by the several states. In this delegation of authority the states have retained control of practically

all matters of domestic concern, and the regulation of industry is one of those matters which was not delegated, so that while the problem of labour legislation is one which is national in its scope, because of the artificiality and virtual elimination of the boundary lines between the different states, it is local in its solution. As no state has any authority to pass legislation which will be effective beyond its own borders, and as the legislators in the different states have different ideas as to the nature of labour legislation, the practical result of our system has been a tremendous mass of labour legislation in the aggregate, and a great diversity as to its nature and administration in the different states.[1]

The theoretical difficulty is based mainly on the proposition that labour legislation necessarily favours a certain class as against other classes, and is, therefore, on general principles, a violation of the constitutional provisions which guarantee equal protection of the laws and equal personal rights to all, unless some justification can be found for this discrimination. From the beginning of labour legislation the principle has been dimly recognised that the inequality of bargaining power between employer and employee was a sufficient necessity for this form of legislation, but the constitutional prohibitions against class legislation were sufficient to raise reasonable doubts as to the validity of many suggested

[1] The immensity of the amount of labour legislation in the United States may be appreciated by the statement that the labour laws in force at the end of 1913 were published by the Bureau of Labor Statistics, Department of Labor, Washington, in two volumes of nearly twenty-five hundred printed pages. *Bulletin No. 148.* This compilation did not include the compensation laws, for they were published separately. *Bulletin No. 126.* The enactments of 1914 were printed in a volume of nearly three hundred pages, *Bulletin No. 166,* and those of 1915 in a volume of nearly five hundred pages. *Bulletin No. 186.* These two bulletins included the compensation legislation of those years. That legislation was also published separately, in *Bulletin No. 185.*

enactments, so that it was not until the courts passed from the theoretical doctrines of *class legislation* to those of *reasonable classification* that the way was clearly open for the necessary legislative relief.[1]

Because of the great volume of labour legislation in the

[1] The case of *Holden v. Hardy*, 169 U. S. 366, decided by the Supreme Court of the United States in 1898, may be regarded as a landmark in the establishment of the principle of *reasonable classification* as distinguished from *class legislation*. While the matter of labour legislation is essentially one of state control, when it comes to a determination as to whether or not such legislation is constitutional the final decision may rest with the federal courts, for the Bill of Rights annexed by amendment to the Constitution of the United States guarantees certain rights to citizens of the United States, and the Fourteenth Amendment further provides that "no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States." By virtue of this provision it is necessary for the federal courts to pass upon any alleged violation by a state of the privileges or immunities of citizens of the United States.

In this case the constitutionality of a Utah statute prohibiting employment in underground mines and in smelters for more than eight hours a day, except in cases of emergency where life or property was in imminent danger, was attacked. This law was passed by virtue of a provision in the Constitution of Utah that "the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines," and the Supreme Court of Utah was of opinion that if the legislature needed any authority to pass the statute it was found under this constitutional provision. It was claimed, however, that the statute was unconstitutional because of the provisions of the Fourteenth Amendment to the Constitution of the United States.

The judgment of the Supreme Court of Utah was affirmed, the court holding that the question for determination in cases where class legislation was alleged was whether or not the legislature had adopted the statute in the exercise of a reasonable discretion, or whether its action was only an excuse for an unjust discrimination or the oppression, or spoliation, of a particular class. A distinction exists between these different attitudes on the part of a law-making body, and legislation based on reasonable discretion is valid while that based on class oppression is invalid. The Utah statute was based on the principle of reasonable discretion, so its validity was upheld.

United States, each state having its own labour laws which may be peculiar, particularly in detail and administration, to the state itself, it is impossible to do any more in this summary than give a brief outline of the principles of this legislation, and this outline will necessarily be confined to that part of labour legislation which relates to employers' liability. This particular part may be divided into three different sub-divisions, and although each sub-division may run into each of the others there is enough distinction between them to justify the classification. The sub-divisions are: (1) laws relating to the safety and health of employees; (2) laws regulating the employment of women and children; and (3) a certain class of statutes which, appropriating the name of the subject itself, have gone under the name "employers' liability" acts.

The purpose of laws relating to the safety and health of employees is to regulate the working conditions of all classes of employees as distinguished from any particular class. The necessity for this legislation arises from the generality of the rules of the common law regarding the duty of the employer to his employees, and the general purpose of it is to protect the health and morals of the employees as well as their physical safety. The common law requires that the employer shall furnish his employee with a safe and suitable place in which to do his work, but as this system is simply an unwritten code of general principles it cannot define specifically just what constitutes the "safe and suitable place" which it requires. The requirements of the different laws relating to safety and health are intended to supplement the generalities of the common law and specify what constitutes a safe and suitable place under the different conditions of industry. When failure to comply with these requirements is shown it appears that the employer has not observed the

standards fixed by the positive provisions of the law for his conduct, and if injury results to an employee by reason of such a failure on the part of the employer the right of the employee to recover damages for his injury is virtually established.

The laws regulating hours of labour, whether applicable to any particular employment or applicable to all employments, are an essential part of the laws relating to safety and health, for it is recognised that excessive working hours will eventually undermine the constitution of any working man, and not only this but the relation between fatigue and industrial accidents is intimate, for a tired workman is not as well able to protect himself as one who is not so affected, so in the interest of the conservation of the health and even the lives of workmen laws of this nature are recognised as a valid exercise of legislative discretion.

The varying conditions of industry demand different laws for different classes of employments, so the laws relating to safety and health are divided into several different classes. The principal classes are the laws relating to factories, those relating to mining and underground work generally, and those which relate to transportation. While all of these statutes have a direct effect on the liability of the employer for injuries sustained by his employees during the course of their employment, in that they fix the standards with which the employer must comply and a failure to observe these standards is, therefore, a violation of the law and by implication makes the employer liable to an employee who may have sustained injuries by reason of the failure of the employer to comply with the standards fixed by the statutes, the purpose of this legislation is not primarily to fix a liability on the employer but to conserve the life and health of the employee. The prevention of injuries rather than the establishment of a right

o receive compensation after injuries have been received is he object which these statutes seek to accomplish.

In the provisions which attempt to conserve the physical ondition of employees by preventing accidents the factory cts prescribe specific safeguards for dangerous conditions nder which an employee may be required to work, and they lso prescribe certain precautions for generally dangerous onditions to which all employees may be exposed regardless f the particular part of the work which they are doing. The tatutes requiring specific safeguards relate particularly to he guarding of machinery so that the dangers of being injured by contact with it will be reduced to a minimum. The usual requirements of these statutes are that all exposed gears shall be guarded; that mechanism for the transmission of power, such as belting and shafting, shall be guarded; and that saws, mangles, emery wheels, and all moving and dangerous machinery shall be securely guarded, or if this is impossible that notice of the danger shall be conspicuously posted. It is also usually provided that shafting shall be provided with tight and loose pulleys, in order that the machinery may be stopped immediately in cases of emergency. The statutes regulating general conditions usually provide that stair openings and entrances to elevator shafts must be sufficiently guarded, that hand rails shall be placed on stairs, that openings in floors must be guarded, and in general that the dangers from all such conditions shall be eliminated as far as possible. One element of this phase of the subject is the inspection of steam boilers which some states require, for the hazard of boiler explosions is one to which many employees, besides those who work around the boilers, are exposed. Another element is that of protection against fire, which is a recent development along this line. This began by first requiring means of escape in case of fire, and then

developed into the precautions required for the prevention of fire.

The statutes which have for their object the conservation of the health of employees have been passed in recognition of the practical consideration that the risks to which workmen are exposed do not arise wholly from the dangers of industrial accidents but that workmen are also exposed to dangers arising from disease and these hazards should be eliminated as far as possible. This legislation is general in its nature, and has not as yet been developed to any great extent. Its provisions relate principally to requirements for proper lighting, heating, and ventilation, so that the physical condition of workmen will be conserved. The hazard of disease in industry exists in two forms, for employees may be exposed to dangers from which diseases will originate independent of the work in which they are engaged, and they may also be exposed to dangers of disease from some of the processes arising from their occupations, which result in the "occupational diseases," so-called. It is the purpose of this legislation, either by positive statutory provisions or by authorising the proper administrative officials to issue the necessary orders, to extend protection to workmen against all dangers of disease as far as protection can be extended, whether such diseases are peculiar to any special occupation or are general in their nature.

The laws which relate to mining and other underground work have the same object as those which relate to factories and other places in which work is being done. The specific requirements for mining work, however, are so different from those for manufacturing work that this legislation is usually codified in a separate collection of laws, and the states which have large mining interests have passed many laws regulating the way in which mining operations shall be conducted that

ogether constitute these mining codes. These regulations efer to the condition of the roof, to the ventilation, to methods f drilling and blasting, removal of accumulations of dust, llumination, and to many other details which are considered ecessary for the safety and health of those working in mines. The importance of regulation for underground work other han mining has become apparent during the past few years ecause of the amount of that work which has been necessary n constructing the foundations for tall buildings and bridges, nd the tunnel work that has been an incident of subway onstruction. One of the principal hazards in this work is a compressed air or caisson disease known as "bends," and it has been the object of regulation either to prevent or to mitigate the effects of this disease as much as possible.

Many laws have been passed to provide for the safety of persons engaged in the work of transportation by land and by water. Some of these laws also have for their purpose the protection of the persons who are being transported. As the larger number of steam railroad employees are engaged in interstate commerce, over which the United States has jurisdiction because of the grant of authority in the Constitution, the most effective part of this legislation is federal rather than state and so the provisions are uniform and uniformly enforced as to the great majority of employees affected throughout the United States. The protection of employees of street or interurban railroads is largely a matter of state or municipal regulation, for very few of those roads do an interstate business so they do not come within federal jurisdiction. The protection of sailors is almost wholly a matter of federal control, for so little navigation is carried on entirely within the bounds of a single state that state legislation along this line is negligible both in character and amount.

The application of safety devices to railroad operations

began with the invention of the air brake. The next step was the application of the automatic coupler, for very many and a considerable proportion of the accidents which happened to trainmen arose from the necessity of going between cars to make couplings and until some practical automatic coupler could be devised this slaughter seemed almost inevitable. When such couplers were devised and their use required by law the number of accidents from this cause was so reduced that it now constitutes a very small proportion of the whole number. The form which the most recent agitation along this line has taken is the demand for "full crew laws," and this phase of the matter has, up to the present time, been largely a matter of state legislation because of the absence of any conflicting legislation by Congress.[1]

The laws which regulate the employment of women and children have been passed in pursuance of the duty of the state to protect those who were unable to protect themselves, and this protection is of a twofold nature in that it contemplates not only the present protection of these classes but the future protection of society. It is to the interest of the future as well as of the present that women shall not be allowed to work at occupations which are manifestly injurious to their health, and it is just as important that they should not be allowed to work an excessive length of time each day in those occupations in which their labour is permitted. It is, therefore, of great social importance that the working conditions of women shall be the subject of reasonable regulation. It is equally important that the work of children shall be similarly regulated, for their employment not only prevents their education and impedes their mental development

[1] For an excellent summary of the principles of the laws relating to safety and health, see *Principles of Labor Legislation*, Commons and Andrews, pages 327–349.

but it also hinders their physical development, and so it is a menace to society if their employment is permitted without any restrictions or regulations.

The form which child labour legislation has taken in most of the states is that of an absolute prohibition of the employment of minors below a certain age in any occupation, and the regulation of their employment between the prohibited age and an older age above which it is unrestricted by any special regulations relating to minors as a class. The laws regulating their employment usually specify that the employer shall have on file a certificate from the parents of the minor certifying as to his age and consenting to his employment, and in addition to this it is sometimes specified that a certificate as to attendance at school for a certain period in each year shall be a condition precedent to the legal employment of a minor above the prohibited age and under a certain higher age. The statutes also provide frequently that minors below a given age shall not be employed at certain classes of work, such as that which involves proximity to dangerous machinery, or that which may be considered injurious to their health or morals. The number of hours during which minors are allowed to work in any one day or in a week in occupations in which their employment is permitted is also one of the elements usually fixed by these statutes.[1]

The effect of the statutes relating to safety and health is to supplement the rules of the common law by prescribing a specific standard for the conduct of the employer in place of the general standard fixed by the common law. These statutes do not in any sense suspend the rule of the common

[1] This is only the briefest possible statement of the principles of child labour legislation. For a digest of this legislation in the United States, as it existed several years ago, see *Summary of Laws in Force 1910, Child Labor*, by Laura Scott, published by the American Association for Labor Legislation, New York.

law that an employer must furnish his employee with a safe and suitable place in which to do his work, but they supplement and amplify that rule by fixing a standard as to what constitutes a safe and suitable place under certain circumstances. In this sense it may be said that they anticipate, to a certain extent, the development of the common law, for although common law rules are necessarily general in their nature they are also progressive, and when it is shown that any standard of safety is better than that previously recognised the common law will abandon the old standard and adopt the new. Applying this principle to the rule of the common law for establishing the negligence of an employer, the failure to observe the conduct of an "ordinarily prudent employer" under similar circumstances, it may be said that if it is shown in any given case that certain safety devices were practicable, and that they were in general use by other employers engaged in the same line of business, the employer who has failed to adopt such devices has not complied with the standard and this failure may be recognised as negligence on his part. Thus the common law in its development would eventually come to recognise many of the standards established by the different statutes, but the enactment of those statutes has obviated the delay which might be a necessary incident of the recognition by the common law of the principles which they establish.

When a violation of one of these statutes is shown in actual litigation by an employee in his attempt to recover damages from his employer for personal injuries alleged to have been sustained in the course of his employment, the effect is to virtually eliminate the defence of contributory negligence and that of assumption of risk, and also the fellow-servant defence if that is in any way involved, and, therefore, to establish the right of an employee to recover. The duties

which are thus imposed on the employer are non-delegable and the employer cannot escape his responsibility by entrusting their performance to any one else, for the person thus delegated becomes the representative of the employer for whose negligence the employer is liable to the same extent that he would be for his own. The result is that when such a violation of duty is established practically the only element remaining in the case is the assessment of damages according to the principles recognised by the common law, unless perchance some statutory modification of those principles enters into the matter.[1]

The effect of a violation of the child labour laws in its relation to a negligence action brought by an injured minor whose employment was against the law is, in general, to establish a case of negligence *per se* against the employer and deprive him of any defence that otherwise he might have had. The only effect of the employment of a minor of tender years at common law would be the difficulty in the establishment of any of the defences that might be available, particularly that of contributory negligence and that of assumption of risk, for it would have to be shown that the minor was of sufficient capacity to be capable of contributory negligence and also that he was of capacity to understand the nature of the work

[1] A good illustration of the extremes to which a court may go in the construction of the statutes relating to safety and health is found in the case of *Caspar v. Lewin*, 82 Kansas 604; 83 Kansas 799; 109 Pacific 657, decided in 1910. This was a case in which an employee was killed by being hurled around a shaft while attempting to shift a belt, and it was shown that a belt-shifter had not been provided as required by the Kansas statutes. It was held that all that was necessary to establish the liability of the defendant was to show that his failure to provide such a safeguard directly contributed to the death of the employee, and that the defence of contributory negligence on the part of the deceased employee could not be interposed when a statutory violation was shown. The opinion in this case contains an interesting history of these statutes in the different states.

and appreciate the dangers involved before he could be held to have assumed the risks inherent in the employment. The employer would not be allowed to interpose either of these defences against the minor in case his employment was prohibited by statute, nor would the fellow-servant defence be available against him, so the liability of the employer would be absolute if illegal employment is shown.[1]

The class of statutes affecting the liability of the employer to his employee which has taken the name of the subject itself, and goes under the general designation of "employers' liability" statutes, has for its object the modification or abrogation

[1] Two cases decided by the Supreme Court of North Carolina are worth citing in illustration of the attitude of the courts when a violation of the child labour laws is shown. They are *Leathers v. Tobacco Co.*, 144 N. C. 330; 57 S. E. 11, decided in 1907, and *Starnes v. Albion Mfg. Co.*, 147 N. C. 556; 61 S. E. 525, decided in 1908. In the *Leathers* case it was held that the employment of a child in a tobacco factory within the age prohibited by statute was negligence *per se*, and that where a child within the prohibited age was set at work at a machine in a factory and was injured while operating the machine, the employment in violation of the statute was the proximate cause of the injury as a matter of law. In the *Starnes* case the question of the constitutionality of the statute was raised, and it was held that the statute was not in violation of either the State Constitution or the Fourteenth Amendment to the Constitution of the United States. The general power to pass laws of this nature was discussed, and it was held that the state as a guardian had the right to control the natural rights of parents when the welfare of society conflicted with parental rights, and that the parents had no vested rights in the labour of their children but that the state has a paramount right to control their labour and education. In this case it was held that the fact that a minor illegally employed was injured at work which he was not employed to do, and which was entirely foreign to his employment, was no defence, for the unlawful employment was the proximate cause of the injury and the facts as to how the injury was sustained were immaterial if illegal employment was established. These cases show, therefore, that the only element remaining in a case where the illegal employment of a minor is alleged and proven is that of the assessment of damages.

of the principal common law defences, the fellow-servant rule, the contributory negligence rule, and that of assumption of risk. The particular statutes in this class which have been known by the name of "employers' liability acts" have had for their precedent and model the Employers' Liability Act of England, and practically all of those statutes which have been passed in the United States followed the English act closely both in principle and form. This act was passed in 1880, so the acts in the United States which have taken it for their precedent and model have necessarily been passed since then.

A number of statutes which had for their object the modification or abrogation of some of the common law rules of employers' liability had been passed before the enactment of any of these so-called "employers' liability acts." The statutes which were thus passed dealt principally with the fellow-servant rule, and with one phase of the application of that rule which was its application to the employees of railroad companies. Some of these statutes were passed very soon after railroads were constructed, and they provided, as a general proposition, that railroad companies should be liable to any person who might be injured in any way by reason of the negligence of any of the employees of the company, so the language was broad enough to abolish the fellow-servant rule in cases where employees were injured even though no mention was made of that particular rule.[1]

[1] It is interesting, from the historical standpoint, to note the connection between railroad operations and the establishment and the abrogation of the fellow-servant rule. The rule was first recognised in this country in a railroad case, that of *Murray v. South Carolina R. R. Co.*, 1 McMullen's Law, 385; 36 Am. Dec. 268, decided in South Carolina in 1841. Although this case was the first to recognise the rule it is not regarded as the leading case in its establishment, but the case of *Farwell v. Boston & Worcester R. R. Corp.*, 4 Met. 49; 38 Am. Dec. 339, decided in Massachusetts in 1842, occupies this position,

In the meantime, by a process of development, the common law in many jurisdictions had come to recognise a modification of the fellow-servant rule in all employments by holding that an employee who represented the employer was not a fellow-servant but a vice-principal, and that the employer was liable to an employee who was injured by the negligence of a vice-principal because of the fact that in contemplation of law the act of the vice-principal was that of the employer. This rule had little uniformity in its application throughout the United States, for some states practically refused to recognise it, and in the different states in which it was recognised the degree of authority which must be possessed by an employee before he could be considered a vice-principal differed greatly. In some states he must have general representative authority, while in others a much less amount of authority would suffice.

The English Employers' Liability Act of 1880 was a piece of legislation which was a declaration of the common law in some particulars, and in others was a legislative recog-

because of the commanding position of Chief Justice Shaw who wrote the opinion, and because of the reasoning in the opinion itself. As the first cases which established the rule were railroad cases, so the first statutes which were enacted to abolish the common law rule related only to railroad operations. This was doubtless because of the fact that the rule was established in this connection and also because of the fact that railroad operations were manifestly more hazardous than many of the other industrial operations at the time of the establishment of the rule and at the time of the enactment of the first statutes for its abrogation. In recent years some of the states, not satisfied merely with the passage of statutes abrogating the fellow-servant rule in connection with railroad operations, have adopted constitutional provisions for this purpose and have thus made the abrogation of the rule in railroad cases a part of their fundamental law. *Section 193, Article 7, Constitution of Mississippi; Section 16, Article XX, Constitution of New Mexico; Section 36, Article IX, Constitution of Oklahoma; Section 15, Article 9, Constitution of South Carolina; Section 162, Article 12, Constitution of Virginia.*

nition of the vice-principal rule. It provided, in brief, that the employer should be liable to an employee who was injured because of any defective ways, works, or machinery, or by the negligence of a superintendent, or of a person entrusted with the power of giving orders, or in case of railway companies the negligent management of trains, points and signals. As to the first specification, that of defective ways, works or machinery, this was merely declaratory of the common law; as to the others the enactment was simply an extention of the vice-principal rule, and it carried that rule no further than the courts might have come to apply it in the development of the common law. Legislation of this nature, for various reasons, was not generally adopted in the United States, but the few states which did pass Employers' Liability Acts drafted their statutes along the lines of the English act.[1]

The statutes which have specifically considered the defences of contributory negligence and assumption of risk have been, to a large extent, simply declaratory of the common law rules relating to those defences. However, all of the statutes which impose any obligations relating to the safety

[1] During the twenty-five years following the passage of the English act only five similar acts were passed in the United States, as follows:—Alabama in 1885; Massachusetts in 1887; Colorado and Indiana in 1893; and New York in 1902. The Colorado act was affected by the passage of a statute abrogating the fellow-servant rule in 1901, and the Indiana act was, by construction in order to sustain its constitutionality, held to apply only to railroad operations. For a compilation of the different statutes relating to employers' liability in force at the end of 1907 see *Bulletin of the Bureau of Labor* (Washington), Vol. XVI (No. 74, January, 1908), pages 54–91. Subsequent to 1907 several of the states passed legislation of this kind, but by this time the agitation for a system of workmen's compensation had become so active that the attention of the legislators was turned to the abolition of the common law system rather than to attempts to strengthen it and continue it in force.

of employees on the employer have a direct bearing on these two defences, for when a violation of such a statutory obligation by the employer is shown the effect is, in general, to deprive the employer of those defences. One of the incidents of the agitation for more stringent employers' liability laws has been the change in the attitude of the courts in the application of these defences, for at one time many of the courts were inclined to hold that certain circumstances constituted contributory negligence or assumption of risk as a matter of law and that there was no jury issue involved, while at a later time the courts in the same jurisdiction would submit similar facts to the jury to determine whether or not the plaintiff was guilty of contributory negligence or had assumed the risks of the hazards to which he was exposed. The natural effect of this procedure has been, in view of the sympathy of juries for injured plaintiffs, to enlarge the rights of an employee against his employer when either of these defences were involved. Some of the states have gone to the extent of incorporating provisions in their constitutions that these defences should at all times be left to the jury.[1]

The efficacy of the laws relating to safety and health and those regulating the labour of women and children depend upon their observance and enforcement. The primary purpose of these statutes, as has already been noted, is the prevention of industrial casualties and the conservation of human resources rather than the establishment of the liability of the employer, and any laws which have this purpose necessarily fail unless they are observed, either by voluntary action or by compulsion, by those subject to their provisions. Experience has shown that the enforcement of laws of this

[1] Section 5, Article XVIII, Constitution of Arizona; Section 6, Article XXIII, Constitution of Oklahoma.

kind by voluntary action is ineffective, and that if such laws are to have any effect at all the state must see that they are enforced, and this enforcement is something which must be made a function of a special branch of the executive department of government rather than an addition to the other work of the executive authorities.

The laws in most of the states, in which any provisions for their enforcement appear, have imposed the duties of enforcement upon the Labor Departments. The usual procedure has been either to make factory inspection and the enforcement of labour legislation generally one of the general duties of the Labor Department, or to make special provisions for this service by the creation of a Bureau or Department of Factory Inspection which shall be a part of the organisation of the Labor Department. The only way in which violations of the law can be discovered, in advance of litigation in which such a violation is alleged, is by inspection of working places, so this element of inspection is a vital element in the proper administration of labour laws.

The practice of factory inspection varies greatly in the different states, but as a general proposition it may be said that in many of the states the duties of the Factory Inspector have been performed in a very perfunctory way, and that the laws relating to safety and health and those regulating the labour of women and children have to a large extent failed in the purpose of their enactment because of indifference in their enforcement. This is due to defects both in the quantity and the quality of factory inspection. The defect in quantity may be attributed to the fact that the laws do not provide for a sufficient number of inspectors to do the work, and so inspections are necessarily infrequent and superficial. The defect in quality is attributable, fundamentally, to the fact that inspectors may be appointed who

lack the necessary qualifications for the work. This condition may arise from two causes, one of which is that the laws in many of the states specify no particular technical or practical training on the part of men who receive these appointments, and so leave the places legitimate political plunder, and the other is the fact that the salary and term of office fixed by law may not be sufficiently attractive to secure those who possess the necessary qualifications.

The provisions in the different statutes regarding access to working places and the penalties for hindering or obstructing Inspectors in connection with their work are usually sufficiently drastic, if enforced, to secure all of the necessary co-operation from employers for making inspections, but the practical conditions have been such that the science of Factory Inspection has not been developed to any degree of efficiency as a governmental function in many of the states of the United States, and as a result the different factory laws have not had the effect that they might have had if they had been properly enforced.[1]

The different statutes which were passed, the development of the common law rules, and the change in the attitude of the courts regarding their application, tended to enlarge the rights of recovery of injured employees, but while their legal rights were thus enlarged the practical situation regarding

[1] This brief summary has considered Factory Inspection only as one of the functions of government imposed upon the executive branch by the factory laws, so no mention has been made of the inspection by employers and by private organisations whose object it is to see that human life and limb are conserved. Inspection of this nature, prompted by an enlightened selfishness, has almost uniformly proved more efficient and more effective than that conducted by the state in accordance with the provisions of the statutes. See *Legislative Summary No. 1, Administration of Labor Laws*, C. B. Austin, published by the American Association for Labor Legislation in 1909, for a digest of the provisions for the enforcement of labour laws then in force.

the procedure for their enforcement tended to nullify the rights which the law allowed them, for these changes in the substantive law were unaccompanied by corresponding changes in the administrative law and the enforcement of the rights was still subject to the older forms of procedure. This situation still necessitated litigation in cases where the employer refused to recognise his liability to respond in damages to an injured employee, and this litigation was subject to the element of uncertainty on the part of the plaintiff as to his ability to establish his right to recover, to the element of uncertainty as to the amount of recovery when his right was established, to the element of delay which can be made an incident of almost all litigation, and to the element of uncertainty as to the collection of any final judgment that might be recovered.

The practical situation, therefore, under the more stringent employers' liability laws, in view of the increase in the number and severity of industrial accidents, was little better than it had been before the passage of these statutes, and it was seen by practical students of the problem that the remedy did not consist in the strengthening of the common law system but in its abolition and in the substitution for it of a system under which industry would be compelled to compensate for the injuries which it caused, under which the element of uncertainty as to the amount which an injured employee was entitled to receive would be eliminated, under which the element of delay in enforcing the right to compensation would also be eliminated, and which would substitute certainty of receiving the compensation to which an injured was entitled for the uncertainty which existed under the common law system.

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CHAPTER V

EARLY ATTEMPTS IN THE UNITED STATES

The first decade of the twentieth century was a period of agitation in the United States for a change in the existing system of employers' liability, and by that time the system of workmen's compensation in some form or other had become so established in practically all civilised nations that the United States instinctively turned to some such system as a substitute for the existing system. During this decade several attempts were made to establish this principle in one form or another by several of the states, but none of these attempts were successful and it was not until the second decade of the century that the principle was adopted, and it seems that this decade will see the principle fully established as a part of the jurisprudence of practically all of the states in the United States. While none of the attempts which were made by the different states to establish the compensation system during the first decade were successful, Congress by the Act of May 30, 1908, 35 Statutes at Large, 556, established the principle to a limited extent as to certain classes of Government employees, but in this legislation Congress possessed arbitrary power and was not hindered by the constitutional restrictions which surrounded the State Legislatures, so this action of Congress cannot be regarded as a precedent for the action of the states but simply as an incident in the history of the movement for the establishment of the compensation principle.

While no tangible action was taken towards the abrogation of the common law system of employers' liability in the United States until after the close of the nineteenth century, there is plenty of evidence that the matter was receiving the attention of students of the subject in this country during the last decade of that century, and that the different methods of dealing with the problem adopted by the European nations had made a profound impression upon those who were giving consideration to the subject. As early as 1891 the late Mr. Carroll D. Wright, then Commissioner of the Department of Labor (Washington), had commissioned Mr. John Graham Brooks to make a study of the German system, then only a few years old, and the result of his investigation was published in the Fourth Special Report of the Commissioner of Labor, *Compulsory Insurance in Germany,* in 1893. In 1898 Mr. William Franklin Willoughby, then connected with the Department of Labor, in Washington, had published a book on *Workingmen's Insurance,* reviewing the compulsory systems in force in Europe and the different voluntary systems in force in the United States, and calling attention to the lack of any action in this country while the movement had been going on in Europe. In 1898 the General Court of Massachusetts, by Chapter 78 of the Resolves of 1898, had instructed the Bureau of Labor Statistics of Massachusetts to investigate "the subject of labor and co-operative insurance," and this report was published in 1901 as Part II of the Thirty-first Annual Report of the Bureau, pages 65–248. This report dealt principally with the systems in force in Europe, and closed with a few general suggestions as to the administration of such systems without making any special recommendations.

The constitutional obstacles, particularly those of a technical nature, which the compensation principle had to sur-

mount will be discussed in a later chapter,[1] but before proceeding any further it is necessary to mention the practical considerations which from a constitutional standpoint impeded the inception of legislation which would substitute the compensation system for the existing common law system. It is the same as that which was noted in connection with the subject of the statutes which were passed relating to employers' liability, the nature of our system of government. While this problem is essentially national in its scope it is local in its solution, for it is a matter over which Congress has no authority, except as to employees of the federal government and the limited confines of federal jurisdiction, so that the only practical and effective action that can be taken must be taken by the different states.

The result of this constitutional situation is that the adoption of any system which is a radical departure from an existing system, and which may tend to put the citizens of one state at a disadvantage in competition with citizens of other states, is naturally a subject of serious consideration, and action in such cases is usually slow and conservative. This was one of the arguments used against the adoption of stringent employers' liability laws, particularly the laws which were based on the English Employers' Liability Act, for it was contended that unless such legislation became practically universal in all manufacturing states the employers in those states which passed this legislation would be at a considerable disadvantage as compared with the employers of other states because of the increase to them in the cost of industrial accidents, which must necessarily be added to the cost of manufacture, and which would, therefore, make the cost of the finished product higher to manufacturers in those states which had stringent employers' liability laws than it

[1] See Chapter VI, *The Constitutionality of Compensation Legislation.*

was to manufacturers in those states which had adopted no such legislation.

This argument was all the stronger when it was proposed to adopt a system under which the employer would be compelled to pay compensation for all industrial accidents, and each state hesitated, because of this practical consideration, to impose such a burden on its employers when the employers of neighbouring and competing states were free from it. It was easily seen that any such system meant a considerable increase in cost over the existing system, and that this element of cost must be added to the other elements of the cost of production, so the only logical conclusion was that this cost would be increased by the adoption of such a system and that it would necessarily be greater in states which had a compensation system than it was in the states which had adopted no such system.

In view of this practical constitutional situation the logical method of tracing the history of this movement in the United States would be by outlining its progress in each particular state which has adopted the compensation system, but in considering the problem as one of national rather than of local significance the proper method is to trace its progress chronologically in the different states. It must be reiterated, however, that in this matter each state has been free, subject to constitutional limitations, to adopt any system that it saw fit to adopt, independent of the action of any of the other states except as such action might be used as a precedent. The result has been that while the same general principle has been observed by the different states which have enacted compensation laws there has been a considerable diversity in the details of the laws. Each state as it has considered the proposition has usually studied the laws of the states which have adopted the system, but various

;es have been suggested so we find this difference in de-

e first workmen's compensation bill to be actually in-
ced in this country was introduced in the New York
;e on February 28, 1898, by Mr. John Ford, then a
ɔer of the Senate, now a Justice of the Supreme Court
ɔw York. The movement which resulted in the intro-
ɔn of this bill had its inception in the Social Reform
of New York City. This club, cognisant of the com-
.tion systems of Europe, particularly of the German
l Insurance System and the British Workmen's Com-
.tion Act of 1897, appointed a committee to study the
ct of which Mr. Miles M. Dawson was chairman, and
ill introduced by Senator Ford was prepared by this
uittee. The bill, which was modelled to a considerable
t on the British Act, was referred to the Judiciary
nittee but was never reported by that committee.[1] A
ɔer of causes were ascribed by those interested in the
:or its lack of consideration. The time was not ripe
uch legislation, its purpose was misunderstood, and so
fforts for its passage were abandoned. It is said, how-
that the movement set in motion by this attempt finally
ted in the passage of the New York Employers' Liability
ɔf 1902.

.e first state in the United States to enact a law declara-
of the compensation principle was Maryland. This
s found in Chapter 139, Acts of 1902, and although it
ɔnly fragmentary in character and ineffective in oper-
, both because of the fact that only a few of the employers
were subject to its operation elected to accept its pro-
ɪs and because of the fact that it was declared uncon-
ional at the first opportunity a court had to rule on the

[1] *nate Journal*, New York, 1898, pages 400–401.

question, it is of more than passing interest to the student of workmen's compensation because of its historical significance.

The law was exceedingly limited in its scope. It applied only to the business of "operating any coal or clay mine, quarry, steam or street railroad" and the work of municipal corporations in "constructing any sewer, excavation, or other physical structure" or the contractors engaged in such work for municipal corporations. It provided that the employers in those occupations should be liable for injuries or death sustained by reason of the negligence of the employer or of any of his servants, except that in case of contributory negligence on the part of the injured or deceased the damages should be one-half of the damages that otherwise would have been payable. While both non-fatal and fatal injuries were mentioned, the statute was ineffective as to non-fatal injuries because no scale of indemnities was fixed for such injuries. The law then provided that none of the employers should be liable if they made certain payments to the Insurance Commissioner to form an Insurance Fund, the rate for the different classes of employments being specified except that for the work of municipal corporations, which was left discretionary with the Insurance Commissioner. It was also provided that the employer might, if he so informed his employees, deduct a proportion of the premium not exceeding one-half from their wages.

The fund thus created was to be known as "The Employers' and Employees' Co-operative Insurance Fund," and the Insurance Commissioner was to be its custodian and administrator. The payment to be made to the dependents in fatal cases was one thousand dollars. It was provided that no contract waiving the provisions of the act should be lawful, and also that the Insurance Commissioner might release em-

ployers from the provisions of the act when shown that such employers were making better provisions for their employees than were required by the act. The report of the operation of the act shows that only nine employers elected to avail themselves of its provisions, and that five settlements in fatal cases were made while it was in force. It was declared unconstitutional by an inferior court in April 1904 and no appeal was taken from that decision, so its operation was ended.[1]

By a resolve of the Massachusetts Legislature, Chapter 87, Resolves of 1903, approved June 5, 1903, the Governor was authorised to appoint a committee of five persons to be known as the Committee on Relations between Employer and Employee. This committee was directed to examine and consider the laws of the Commonwealth concerning a variety of matters regarding the legal relations of employer and employee, among which was included that of "the liability of the employer for injuries received by the employee in the course of his employment." This committee was appointed June 9, 1903, and was headed by the late Mr. Carroll D. Wright, one of the acknowledged authorities of his day on matters of labour legislation, and the pioneer in the administration of labour laws, the collection of labour statistics, and in the investigation of matters concerning the relation of capital and labour, who a number of years before, as Com-

[1] *Franklin v. The United Railways and Electric Company of Baltimore*, Court of Common Pleas of Baltimore, April 27, 1904. This opinion is given in Vol. XI of the *Bulletin of the Bureau of Labor* (Washington), page 689. No. 57, March, 1905. No mention of the constitutional features of this legislation is made here, because that phase of the subject is discussed in the chapter on "The Constitutionality of Compensation Legislation," infra. For a summary of the operation of this act see the above named volume of the *Bulletin of the Bureau of Labor*, pages 645–648.

missioner of Labor, in Washington, had been responsible for the investigation by Mr. John Graham Brooks into the German System of Compulsory Insurance, to which reference has already been made in this chapter.

This committee reported to the Senate and House of Representatives on January 13, 1904.[1] The committee reviewed the common law system of employers' liability with its statutory modifications, and reported that it was deemed inexpedient to amend the Employers' Liability Act. It then noted the compensation systems of the different foreign countries and the principle upon which they were based and recommended the enactment of a workmen's compensation bill, a draft of which was incorporated in the report, modelled substantially on the British Workmen's Compensation Act of 1897.

Neither this bill nor any substitute for it was passed, and it does not appear that this part of the report ever received any very serious consideration from the General Court, but inasmuch as it is the first comprehensive compensation bill, with the exception of the New York bill already mentioned, which was suggested in any of the states of the United States, and as it is the first to have been suggested as a result of official investigation, and because it had the sanction of Mr. Wright, it is well worthy of consideration as an important incident in the history of the compensation movement in the United States.

The bill was limited in its application to railroad operations, work in a factory, workship, mine, quarry, engineering work, and construction work where scaffolds or ladders were used, or on which power-driven machinery was used.

[1] *Report of Committee on Relations between Employer and Employee*, Boston, January, 1904. The report and the appendix make a pamphlet of one hundred and eighteen pages, of which twenty were devoted to the subject of Employers' Liability, pages 36–56.

It was committed, therefore, to the principle of a limitation in the application of compensation laws, but the enumeration and the definitions of terms were broad enough to include practically all employments which involved any occupational dangers, so the law would have been general in its application if it had been enacted. It applied to "personal injury while performing duties growing out of or incidental" to the employments which were covered, but it preserved the rights of the employee in cases where the injury was caused by the negligence of the employer, or that of any person for whose negligence he was liable, by allowing the employee to elect after the injury either to receive compensation under the act or to proceed independently of it, but his election was final and he was bound by the proceedings first instituted. The employee could not receive compensation if injured by his own wilful or fraudulent misconduct.

No compensation was payable for an injury which did not disable an injured for at least one week. After the first week the payment in non-fatal cases was to be fifty per-cent of the average weekly wages, not to exceed ten dollars a week, for a period not exceeding four years. In fatal cases the dependents who were wholly dependent were to receive three years' earnings of the deceased or one thousand dollars, whichever was the largest, but not exceeding two thousand dollars; those partly dependent were to receive a sum not exceeding that paid to those wholly dependent, the amount to be determined upon by agreement or arbitration.

The bill contemplated the adjustment of all disputes between the parties by a committee on which employer and employee should have equal representation, but if this committee failed to come to an agreement the matter was to be submitted to a single arbitrator agreed on by the parties, or in the absence of such agreement the arbitrator, who should

be called a referee, should be appointed by any Justice of the Superior Court. Appeal from the decision of the referee on matters of law could be taken to the Supreme Judicial Court.

This bill was manifestly incomplete according to later standards of compensation legislation, but the committee which proposed it contained representatives of both capital and labour and there was no dissent from any member of the committee as to that part of the report, so it shows that both of those interests were dissatisfied with the existing system of employers' liability and would welcome a change to the compensation principle. If any doubts as to the constitutionality of the proposed bill arose in the minds of the committee they were not expressed.

In 1905 the General Assembly of Illinois by a resolution approved by the House on May 2d and by the Senate on May 4th, page 401, Laws of 1905, authorised the appointment of a commission of five members who should serve without remuneration and whose duties were to investigate the matter of providing a plan for industrial insurance and old age pensions for workingmen, and draft a bill for these purposes for the consideration of the next General Assembly, and make their report to the Governor. This commission investigated and reported as directed, the report being printed in 1907 by the State of Illinois in a pamphlet of thirty pages entitled "Report of the Industrial Insurance Commission to the Governor of Illinois."

This report noted the different legal systems which had been devised in the civilised nations for dealing with the problem of the industrial accident, and reviewed briefly the common law system pointing out the salient features of the defects and shortcomings of that system. It did not make any recommendations upon the matter of old age pensions, and it did not go into that subject at all, for it stated that

the most natural approach to that much needed protection was through accident insurance, and the commission had not had adequate time for maturing plans on that subject. The passage of a law was recommended whereby employers and employees could agree upon a system of insurance against accidents which might occur in the course of employment that would be a substitute for the common law system of employers' liability, and a draft of a bill which would establish such a system was presented with the report.

This bill proposed that the employer and employee might by agreement substitute a system of accident insurance for occupational injuries for the existing common law rights. It was provided that this insurance should be effected in any casualty insurance company authorised to transact that class of business in the state, or that employers who had not less than fifteen hundred employees might establish their own fund, the records of which should be subject to the inspection of the Superintendent of Insurance in the same manner as those of the insurance companies. Benefits were provided for non-fatal injuries and for the dependents in fatal cases. The employer was to pay at least one-half of the premium necessary to carry the insurance and the employees were to pay the balance. Neither this bill nor any substitute for it became a law, and the common law system remained in force until in part superseded by the compensation legislation of 1911.[1]

[1] The report of the Illinois Commission is a most significant document in the history of the compensation movement. The bill suggested embodied a principle which was already recognised at common law, and was some extension of that principle, so there seemed to be no question as to the constitutionality of the proposed legislation. The acceptance of benefits after an injury under a pre-existing contract had been held as not in violation of public policy at common law, for although there might be some objection to such a contract on the ground that it de-

In the meantime President Roosevelt, impressed by the injustice of the common law system, had begun an agitation for the adoption of the compensation system, but as the power of Congress in this particular was limited to a very small

prived the courts of their jurisdiction, it was held that the acceptance of the benefits rather than the making of the contract was the factor which waived the common law rights, and that this acceptance was valid. The matter had been the subject of statutory modification in several of the states, some statutes declaring that such an agreement should not constitute a waiver of legal rights, while others specified that the benefits thus received from the employer might be shown in reduction of the damages assessed in a common law action.

The proposed bill, therefore, gave statutory sanction to the practice already recognised at common law. The agreement suggested was absolutely voluntary, and neither employer nor employee were penalised if they did not enter into the agreement. Subsequent experience showed that the bill, if it had been enacted, would doubtless have been ineffective, for a few years later laws embodying a similar principle were passed in Massachusetts and New York which were disregarded and so were ineffective, and there is no reason to believe that the situation in Illinois would have been any different. The suggestion of this principle, however, is very significant in its relation to the compensation movement, for as the suggested voluntary agreement was an extension of a principle already recognised at common law, so the principle of an elective compensation law, which was devised and put into operation in a number of the states in order to overcome the constitutional objections which were interposed to compulsory compensation laws, was a logical extension of this principle, the fundamental difference between this voluntary agreement and the elective compensation law being the element of compulsion which impels both the employer and the employee to come within the provisions of an elective law. Thus this suggestion of the voluntary agreement seems to be the connecting link between the waiver of common law rights in return for certain benefits, which was recognised by the common law, and the principle of the elective compensation law. It was also suggested in Wisconsin that a law which would embody this principle might be adopted as a substitute for the existing system of employers' liability, but no action was taken towards the adoption of such a law. Part I, *Thirteenth Biennial Report*, 1907–08, Bureau of Labor and Industrial Statistics, Wisconsin, pages 111–114.

This report possesses further significance because of the fact that appended to it, but without recommendation for action by the General

field outside of any legislation that it might pass to compensate injured employees of the federal government Mr. Roosevelt's agitation did not have any tangible results aside from the limited compensation act for government employees which became a law on May 30, 1908. The effect of his utterances, however, should not be underestimated, for although they did not result in the passage of any legislation by Congress for the territory over which it possessed jurisdiction and the Act of May 30, 1908, is exceedingly limited in its scope, yet the ideas which he expressed gave a great impetus to the movement for a change from the existing system to a compensation system. The desire for such a change was already becoming crystalised in definite plans of action in several of the states, and the moral influence of Mr. Roosevelt in favour of this change was a factor which must have helped.[1]

Assembly, was a draft of a bill which provided for a system of compulsory insurance for disability caused by injuries received, or illness or other incapacity contracted in the course of employment. This bill was a modification of the German System of Compulsory Insurance. The counsel for the Commission, who drew the bill in accordance with the desire of the Commission, sent a letter to the secretary of the Commission in which he expressed the opinion that the proposed legislation was unconstitutional, and this letter was printed with the report. The secretary in commenting on the views of the counsel stated that if experience counted for anything it was safe to assume that a satisfactory insurance system could not be worked out and put into operation without legal requirement, for only a small majority of the workmen were able to organise such a system and employers generally would not take the trouble to organise adequate systems. If, therefore, the proposed compulsory insurance system was unconstitutional the hope was expressed that some way might be devised to obviate the constitutional objections. The bill actually offered for present enactment, that establishing a voluntary insurance system, was only a temporary expedient, but it contained a principle which might gradually expand until the desired results were reached.

[1] The official utterances of President Roosevelt on the question of employers' liability and workmen's compensation are contained in sev-

The Act of Congress of May 30, 1908, 35 Statutes at Large, 556, applied the compensation principle to certain classes of government employees. Those included were labourers in manufacturing establishments, arsenals or navy yards, on construction of river and harbour or fortification work, and hazardous employments in the reclamation of arid lands or under the Isthmian Canal Commission. This act was amended by the Act of March 4, 1911, 36 Statutes at Large, 1363, so as to include all employees of the Isthmian Canal Commission; and it was further amended by the Act of March 11, 1912, 37 Statutes at Large, 74, to include employees engaged in hazardous work under the Bureau of Mines or in the Forestry Service, and by the Act of July 27, 1912, 37 Statutes at Large, 238-39, to include employees in any hazardous employment in the Lighthouse Service.

The law provided for the payment of full wages to in-

eral messages to Congress. In his message of December 3, 1906, he made a general reference to the subject. This was after the passage of the Employers' Liability Act relating to common carriers, and he took occasion to commend this legislation and endorse the principle that the risk of industrial accidents should be placed on industry itself. *Abridgment of the Messages and Documents*, 1906, Vol. 1, pages 21–22. In his message of December 3, 1907, he made the following statement: "I urge upon Congress the enactment of a law which will at the same time bring Federal legislation up to the standard already established by all European countries, and which will serve as a stimulus to the various states to perfect their legislation in this regard." *Abridgment of the Messages and Documents*, 1907, Vol. 1, pages 25–27. Shortly after this, on January 6, 1908, the Act of June 11, 1906, which President Roosevelt had commended in his message of December 3, 1906, was declared unconstitutional by the Supreme Court of the United States, *The Employers' Liability Cases*, 207 U. S. 461, and this was the occasion of a special message on January 31, 1908, *Congressional Record*, 60th Congress, 1st Session, pages 1347–49, during the course of which the President vigorously urged the passage of a compensation law for Government employees. The subject was again mentioned in his last regular message to Congress, that of December 8, 1908. *Abridgment of the Messages and Documents*, 1908, Vol. 1, pages 16–18.

jured employees in cases where the injury was not due to the negligence or misconduct of the injured employee and where the disability lasted more than fifteen days, for a period of one year after the injury, if the disability lasted that length of time. In fatal cases the law specified certain dependents to whom the payments should be made during the balance of one year from the date of the injury after the death of the injured. The administration of the law was vested first in the Secretary of Commerce and Labor, and later, after the establishment of a separate Department of Labor, in the Secretary of Labor. All questions regarding the application of the law were to be determined by the Secretary, and his decision was final.

Although this legislation did not produce a scientific compensation law its passage was an event of considerable significance in the compensation movement, because it committed the federal government to the compensation principle. The situation was worse for government employees than it was for the employees of private employers, for under the theory that a sovereign government could not be sued without its consent the employees of the federal government who were injured in the course of their employment had no redress at all except that the individual might appeal to Congress for relief, but if he was unsuccessful in his appeal to Congress he received no compensation. This law reached only a small proportion of the government employees, and it was manifestly inadequate in non-fatal cases where the disability lasted over a year, and in fatal cases where dependents survived, but as a concession on the part of Congress, as a recognition of the compensation principle, and as a precedent for the action of the states, it was a step in the right direction.

A statute was passed in Massachusetts in 1908, Chapter

489, Acts and Resolves of 1908, which sanctioned the principle of a voluntary agreement for compensation as a substitute for the common law liability that had been recommended to the General Assembly of Illinois by the Industrial Insurance Commission. The Illinois bill provided for a system of insurance in accordance with a scale of benefits fixed by law. The Massachusetts act as originally passed provided that any employer of labour might submit a plan of compensation to the State Board of Conciliation and Arbitration, and that the Board, after due notice and a public hearing, might if it considered the plan fair and just give it approval. The employer could then enter into a contract with his employees to substitute this plan for his common law liability, but approval of any such plan by the employees should not be required as a condition precedent to employment. The act was amended in 1909, Chapter 211, Acts and Resolves of 1909, so as to permit the employees to petition the Board for an approval of a plan submitted by them, and this plan when approved by the Board and adopted by the employer should have the same effect as a plan suggested by the employer and adopted by the employees after approval by the Board.

This legislation in Massachusetts was rendered absolutely nugatory by the failure of both employers and employees to submit any plans for approval, but it is significant because it was the first legislation general in its application which permitted the substitution of a voluntary system of compensation for the liability imposed by the common law. The compensation law in Massachusetts followed so closely after the enactment of this legislation that it may perhaps be said that the law never had a fair chance to show its merits, but there seems to be good reason to believe that it would not have afforded any relief from the common law system, and as this

voluntary system of compensation did not work in Massachusetts there is no reason to believe that it would have worked in the other states.

In 1909 a law was passed in Montana, Chapter 67, Laws of 1909, establishing the "Employers' and Employees' Co-operative Insurance and Total Permanent Disability Fund." This law applied only to labourers employed in and around any coal mines and coal washers in the state. It provided that the operators of the mines and washers should pay one cent a ton for every ton of coal mined, and that the employees should allow one per cent. of their monthly wages to be deducted each month, these amounts to be paid to the State Auditor, who should in turn pay the money over to the State Treasurer for custody. The fund established was to be administered by the State Auditor, whose authority over its administration was both arbitrary and plenary.

The law provided that in fatal cases a payment of three thousand dollars should be made to the dependents. In non-fatal cases where permanent incapacity resulted a payment not to exceed one dollar a day was to be made. The injured was allowed to elect after an injury either to accept the benefits of the law or to enter a suit at common law; the acceptance of benefits waived his common law rights, and conversely the commencement of a suit to recover at common law forfeited the right to receive benefits under this law. This provision of the law, however, was responsible for its overthrow, for it was declared unconstitutional because of the fact that the employer had no immunity from suit at common law, for after he had made payments to the Fund as required by law the employee could still sue at common law, and he was still required to defend and be responsible for any judgment that might be recovered, hence the law was declared

invalid because it deprived the employer of the equal protection of the law.[1]

In 1910 a statute was passed in Maryland, Chapter 153, Laws of 1910, which established the "Miners' Co-operative Insurance Fund" for the miners of Allegany and Garrett Counties. The law established a separate fund for each county, and taxed the operators and the employees equally for the support of the fund. The Treasurer of each county was made the custodian of the fund for his county, and the County Commissioners of each county were the administrators of the funds. Payments were specified for both fatal and non-fatal injuries, the acceptance of benefits constituting a waiver of the rights of the dependents or of the injured at common law. It was provided that in cases of recovery by suit the operator might after having satisfied the judgment deduct that amount from the future payments to the fund. The bringing of a suit to recover damages at common law operated as a forfeiture of the right to receive benefits from the Fund.

In 1909 the Legislature of New York, by Chapter 518 of the Laws of 1909, authorised the appointment of a Commission to investigate the matter of employers' liability. This Commission consisted of three members from the Senate, five members from the Assembly, and five members appointed by the Governor. The members who were appointed by the Governor represented both employers and employees, and also the economists who had been studying the problem in its theoretical aspects. This investigation in New York was one of the most significant and productive events in the whole compensation movement in this country, because sentiment had already crystalised in favour of a change in the existing system, the work of the Commission was thorough, and it

[1] *Cunningham v. Northwestern Improvement Co.*, 44 Montana, 180; 119 Pacific, 554.

attracted attention all over the country. It resulted in the enactment of a compulsory compensation law which, although it was limited in its scope and was soon declared unconstitutional, was the entering wedge in compensation legislation in the United States, and in the enactment of a law which permitted the substitution of a voluntary compensation scheme for the common law liability, along the line of the legislation which had been suggested in Illinois and adopted in Massachusetts, for employments which did not come within the scope of the compulsory compensation law. Both of these laws were passed substantially as recommended by the Commission.[1]

The compulsory compensation law which was passed on the recommendation of the Commission applied to certain employments which were "determined to be especially dangerous." The employments were: structural iron work; the operation of hoisting machines in connection with construction work; work on scaffolds elevated twenty feet or more; work around apparatus charged with electric currents; work where explosives were used; the operation of railroads; the construction of tunnels and subways; and work carried on under compressed air. It will be seen at a glance that the practical constitutional objection to this legislation was obviated by making the law apply only to occupations which were noncompetitive in their nature as far as other states were concerned, so that the element of the increase in cost to New York employers was not a factor in the case from that standpoint.

In cases where injuries were caused in the specific classes of employments by a risk inherent in the nature of the employment, or by the failure of the employer or of any of his officers, agents, or employees to exercise due care or to comply

[1] Report to the Legislature of the State of New York, March 19, 1910.

with any law affecting such employment, the act allowed the injured employee to elect to receive the benefits provided in the law or to pursue his remedy at common law independent of the act, but either election when once made was final. If he started an action at common law this procedure automatically waived his rights under the compensation act, and the acceptance of benefits under this act likewise automatically waived his rights at common law. The benefits specified were, in brief, in fatal cases a payment to total dependents of twelve hundred times the daily earnings of the deceased, subject to a maximum of three thousand dollars; the payment to partial dependents was a proportionate sum of that allowed to total dependents, not exceeding the maximum, according to the injury which could be shown to such dependents; in non-fatal cases the payment was fifty per cent. of the average weekly wages during disability, subject to a maximum of ten dollars a week, for a period not exceeding eight years from the date of the accident. The compensation payments were made preferential claims against the assets of the employer, but no security for their payment was required.

No special administrative features were provided in the law. It was specified that disputes arising under it should be settled either by agreement or by arbitration as provided in the code of civil procedure, or that an action might be brought in the courts to enforce rights under the law. The life of this legislation was short. It went into effect on September 1, 1910, and was declared unconstitutional in the case of *Ives v. South Buffalo Railroad Co.*, 201 N. Y. 271, 94 N. E. 431, on March 24, 1911, but during the period while it was in force its operation was rendered practically nugatory by the provision in it which allowed the injured party to elect, after an injury, whether to accept the benefits of the law or to stand on his rights independent of this law.

The voluntary compensation law, Chapter 352, Laws of 1910, went into effect on the same date as the compulsory law. This law amended the existing Employers' Liability Law, and then proceeded to establish a voluntary compensation system which employer and employee might by agreement substitute for the existing system. The agreement must be in writing signed by both employer and employee, or their authorised agents, and acknowledged in the same manner as conveyances of real property; it must then be filed with the County Clerk in the county in which it was signed by the employee. Both parties were then bound by the agreement, and the injured employee or his personal representatives had no other rights against the employer except in cases where the injury or death was caused by the failure of the employer to obey authorised orders regarding the safety of his employees, or by his serious or wilful misconduct. Agreements made in accordance with the law could be cancelled at any time by either party on sixty days' notice to the other.

The scale of benefits was just the same as that specified in the compulsory compensation law. The administration of the law was also substantially the same as that of the compulsory law, the act providing that any question of law or fact which might arise regarding the application of the law should be determined either by agreement or arbitration, or by an action at law. The only difference between this provision in the two laws was that the action specified for recovery under the compulsory law was that for negligence while under the voluntary law the action was that for a breach of a written contract. As in the compulsory law no security was required for the performance of the obligations; the rights to receive the payments constituted preferential claims against the assets of the employer the same as claims for unpaid wages for personal services.

This law was similar in principle to the Massachusetts law which has already been noted in this chapter, but it went further than the Massachusetts law in that it prescribed the scale of benefits which should be paid when agreements were made in accordance with its provisions. The experience with this law in its practical operation was the same as that with the Massachusetts law; it was rendered nugatory and ineffective by the failure of employers and employees to make the agreements which it sanctioned. The lesson which was learned from this legislation in Massachusetts and New York was that a compensation system which was in fact based upon the voluntary agreement of employers and employees was an impractical solution of the problem of employers' liability.

REFERENCES

Practically all of the references to this chapter have been given in the text or in the notes. In addition to those cited the following may be noted:

Report of Atlantic City Conference on Workmen's Compensation Acts, July 1909; published by H. V. Mercer, Minneapolis, Minn.

Recent Action relating to Employers' Liability and Workmen's Compensation, L. D. Clark, Bulletin of the Bureau of Labor (Washington), Volume XXI, page 675. (September, 1910.)

Proceedings of Conference of Commissioners on Compensation for Industrial Accidents, Chicago, November, 1910; published by A. T. Saunders, Clinton, Mass.

Problems and Progress of Workmen's Compensation Legislation, T. I. Parkinson, American Labor Legislation Review, Vol. I, page 55.

CHAPTER VI

THE CONSTITUTIONALITY OF COMPENSATION LEGISLATION

The practical constitutional situation which impeded the inception of compensation legislation in the United States has already been mentioned. Each state hesitated to impose any burdens on its employers which would put them at a disadvantage with the employers of other states with whom they were in competition, and so the inception of this legislation was postponed until employers in all commercial and manufacturing states were convinced that a change was necessary, and that when a satisfactory solution of the different difficulties which surrounded the adoption of the compensation principle was found and a law passed in one state which would serve as a precedent for the action of other states, each state would adopt this principle with little delay so that the objections which were interposed to this legislation from this standpoint would in effect be eliminated.

Passing from the practical to the technical constitutional consideration it may be said, as a brief statement of the case, that when legislation was proposed which would at one stroke substitute the idea of the liability of the employer without any fault on his part for that of his liability based on some actual or constructive negligence, around which the common law system of employers' liability centred, the first question that suggested itself, after the necessity and the expediency of this legislation had been admitted, was, is such legislation constitutional? Does it conflict with any of the constitutional

limitations placed upon the arbitrary exercise of legislative power in the interests of the citizens of a state? Can the legislature make the employer pay in cases in which he is in no way responsible for injuries received by his employee during the course of his employment, and conversely can the legislature deprive the employee of his right to recover compensatory damages from his employer for injuries which he can show were caused by reason of the negligence of the employer? The constitutional limitations protect both parties, and so the rights of both must be considered.

In considering this subject of the constitutionality of compensation legislation the basic distinction should be noted at the outset between a statute which simply abrogates an established rule of the common law and one which conflicts with some right guaranteed by a written constitution. Some of the rules which constitute the common law system of employers' liability were based simply on rulings of the courts as to the principles of the common law as specific cases were presented for determination, while others rested upon principles which had their basis in rights which were guaranteed by the federal and state constitutions. There could be no question as to the constitutionality of any legislation which simply altered the rules of the common law, but if it could be shown that such legislation conflicted with any constitutional rights the courts must declare it invalid.

In establishing the principle of liability without fault, which is one of the basic elements of the compensation system, the legislatures at one stroke eliminated the three recognised defences which have been available to the employer when actions have been brought against him by an employee for injuries alleged to have been sustained in the course of his employment, that of assumption of risk, the fellow-servant rule, and the defence of contributory negligence. The ques-

tion then arises as to whether or not the employer has a right to either one of these defences which is protected by any constitutional provisions. If so the legislation is invalid, but if not it is a valid exercise of legislative power.

The defence of assumption of risk rests upon the principle that an employee assumes the risk of all of the dangers inherent in his employment of which he is cognizant, and against which he is as well able to protect himself as any one else can protect him. The statutes which were passed relating to this defence prior to the compensation laws were largely declaratory of common law principles, and provided that the employee should assume only the ordinary risks incident to his employment, or that this issue should in all cases be one of fact for the jury to determine. If any of these statutes had attempted to abrogate this rule altogether there might have been some question as to their validity, but as they were in the final analysis simply declaratory of the common law it does not seem that any such question could arise.

The fellow-servant rule is a rule of the common law which is safeguarded by no constitutional protection. It is, in fact, an exception to the general rule of the common law. The law of master and servant before the industrial era grew up around two general principles, that of the liability of the master to third parties for the torts of his servant committed in the scope of his employment, and the rights of the master against third parties for acts because of which the master might have been deprived of the services of his servant. It was a principle of the common law that a master was liable to third persons who were injured by the servant by acts done within the scope of his employment, and when the occasion arose it was attempted to hold the employer liable to an employee who was injured in the course of his employment by reason of the negligence of a co-employee, but instead of allow-

ing the employee the same rights which a third party had against the employer in such cases it was held that the risk of injury from the acts of a co-employee was one of the hazards which the employee assumed as an incident of his employment and no recovery was allowed.

This rule was, therefore, an exception to the rule of the common law which had previously been recognised, and many statutes were passed by virtue of which it was either modified or abolished. As the rule was based only on the decisions of the courts as to the application of the common law and not upon any constitutional guarantees there could be no question as to the validity of the legislation if the legislature, in the exercise of its discretion, decided to pass laws in modification or abolition of it, and such laws as were enacted passed unchallenged as to the lack of legislative authority to pass this legislation, for it was assumed that the legislature had the power to place employees on the same basis as to the liability of the employer for injuries sustained in connection with his business operations as those who were not employees.

The defence of contributory negligence is based on the rule founded on natural justice that when injury is caused to a person solely because of his own negligence there is no logical reason why any other person should be compelled to recompense the injured in any way for the financial consequences of his injury, and this rule is applicable alike to employers' liability cases and to cases where the relation of employer and employee does not exist. When any legislation attempts to deprive the employer of this defence and make him absolutely liable for injuries sustained by his employee during the course of his employment, regardless of any actual or constructive fault on the part of the employer, the question immediately arises as to whether this deprivation is not an invasion of the constitutional rights of the employer, for such

ability is essentially a deprivation of property, and it is arbitrary deprivation in that it fixes this absolute liability the employer without any fault on his part and with no ortunity to protect himself from the carelessness of the ired employee. It is one of the established principles of lish and American constitutional government, protected vritten constitutional guarantees in the United States, that erson shall be deprived of his property without due pro- of law, and in the application of this principle to this ation the issue is as to whether this absolute liability of employer is not an invasion of this constitutional right. t may be difficult to frame a comprehensive definition of expression "due process of law," or its synonym "law of land," or any other expression which may be applied to constitutional privilege, but it may be said as a general osition that when any claim is made against a party ch involves a deprivation of property that party is en- d to have the claim passed upon by the judicial authori- . In the application of this principle to the law of em- ers' liability the procedure which had become established that when an employee made claim against his employer injuries alleged to have been sustained during the course his employment by reason of the negligence of the em- er, and the employer denied this allegation of negligence his part, he was entitled to have this issue passed upon by ry before judgment could be entered against him on the m. The situation, therefore, involved the right of trial jury, which was an established institution of the common system as an essential incident of this constitutional rantee of due process of law. The fundamental question, , in determining upon the authority of the legislature to a law which would at the same time establish the absolute ility of the employer for all occupational injuries and

deprive him of the right of a trial by jury to pass upon the issue of his liability, was as to whether or not the establishment of such a liability was due process of law within the meaning of the state and federal constitutions.

It may be noted that in the consideration of this question the courts have distinguished between negligence on the part of the injured which did not involve any wilfulness or intention to produce injury and that which did involve such wilfulness or intentional negligence, and that the constitutionality of a voluntary compensation law which removed the defence of contributory negligence from employers who failed to accept it, but preserved the common law rights of the employer in cases where the employee was injured by reason of his serious and wilful misconduct has been upheld. It seems, therefore, that for compensation purposes this defence assumes two different aspects, depending upon whether or not the element of wilful or intentional negligence is present, and that the defence may be removed if it does not go to the extent of depriving the employer of his common law rights in cases where injuries are intentionally inflicted upon himself by an employee.

Another constitutional objection, but one which must be classed as of a minor nature because it is not general but is limited in its application, which may be interposed in some states to a compensation law which applies to fatal injuries is the fact that the state constitution may prohibit the legislature from setting any limit to the amount of damages which may be assessed in fatal cases. This objection is not valid unless there is some such constitutional limitation, for in the first place the right of the dependents or of the personal representatives to recover in fatal cases is not a common law right but one granted by statute, and then when the legislature grants the right it may place any limit on the recovery

[redacted]at is deemed advisable, but if either the right to recover [redacted]r the amount of recovery is regulated by the constitution it [redacted]s beyond the power of the legislature to interfere with such [redacted]onstitutional provisions.

The various attempts which were made to establish compensation systems in the different states during the first decade of the twentieth century were failures. The Maryland, Montana, and New York laws, which established the compensation principle as to certain industries in those states were declared unconstitutional, and the laws which were passed in Massachusetts and New York permitting the establishment of compensation systems by voluntary agreement were rendered inoperative because of the failure of employers and employees to come under the provisions of the laws. The experience during this period, therefore, taught two lessons: first, that the constitutional objections to the system must be overcome; and second, that if a compulsory system could not be established constitutionally, any system that was established which might in theory be voluntary must in fact contain such elements of compulsion to elect the provisions of the law that it would be manifestly for the interests of both employers and employees to come within the system rather than stand on their common law rights. The leading cases which passed upon the constitutionality of compensation legislation will be reviewed briefly in this chapter, and the means which were devised to establish a system which is voluntary in theory but is practically compulsory in fact will be noted.

The law which established the Co-operative Insurance Fund in Maryland, Chapter 139, of the Acts of 1902, was declared unconstitutional in 1904. The decision was rendered in the Court of Common Pleas of Baltimore and no appeal was taken from it, so the court of last resort in Maryland did not have an opportunity to pass on the question.

The case is that of *Franklin v. The United Railways and Electric Co.*, and the opinion can be found in Bulletin No. 57 of the Bureau of Labor (Washington), page 689. It was a suit brought by an injured employee against the defendant for injuries sustained during the course of his employment, and the defendant pleaded as a defence that it was a contributor to the Co-operative Insurance Fund, to which defence the plaintiff demurred on the ground that the law establishing the fund was unconstitutional, and the demurrer was sustained.

The court held that in the establishing of the fund and vesting of plenary powers as to its administration in the Insurance Commissioner it might be argued that the law was constitutional if it had been confined in its operation to those who had no remedy prior to its establishment, but that inasmuch as its application was general, including cases where the employer was liable as well as those in which he was not liable, it violated the provision of the constitution which preserved the right of trial by jury and that which gave to everyone a remedy by due process of law for any injury done to him. This decision is more interesting than valuable, for the law in itself was extremely limited in its application, and it was wholly optional with the employers to whom it did apply as to whether or not they should elect to come within its provisions, and as this case was decided by an inferior court it is of little value as a precedent, but it is worthy of note because of its historical position.

The Montana statute which established the "Employers' and Employees' Co-operative Insurance and Total Permanent Disability Fund," Chapter 67, Laws of 1909, was declared unconstitutional in the case of *Cunningham v. Northwestern Improvement Co.*, 44 Montana, 180; 119 Pacific, 554. This was a proceeding brought by the plaintiff, who was State

Auditor, to recover from the defendant, a corporation engaged in the business of operating coal mines and coal washers, the assessment for which it was liable for the support of the fund. The case was submitted to the District Court on an agreed statement of facts which raised the question of the constitutionality of the statute, and a judgment rendered in favour of the plaintiff; an appeal was taken from this decision to the Supreme Court and the judgment was reversed and the case was remanded with directions to enter a judgment for the defendant, on the ground that the statute was unconstitutional.

Several different reasons were assigned why it was alleged that the law was unconstitutional, the principal of which were that it was not an exercise of the police power, that it violated the constitutional guarantee of trial by jury, that it operated to take property without due process of law, and that it deprived the employer of the equal protection of the laws. The court held that the act was an exercise of the police power, and that it was within the power of the legislature to establish such an industrial insurance system if it was deemed necessary. It held that the right of trial by jury was not violated, and that none of the provisions of the law were in conflict with the constitutional inhibition against the deprivation of property without due process of law. It may be noted, however, that the reasoning of the court in disposing of these two objections is open to question. The fatal constitutional objection in the opinion of the court was that the statute deprived the employer of the equal protection of the laws, in that it afforded him no immunity from suit and liability to pay a judgment if an injured employee elected to sue rather than receive the benefits of the fund. The obligation on the part of the employer to contribute to the fund was absolute, but he also might be compelled to

defend a suit and pay damages after he had contributed to the fund, hence the act was invalid because it did not afford the employer the equal protection of the laws.

The compulsory compensation law of New York, Chapter 674, Laws of 1910, which went into effect on September 1, 1910, was declared unconstitutional in the case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271; 94 N. E., 431; on March 24, 1911. This case is one of the most important compensation decisions in the United States. The New York law which it overthrew applied to several classes of occupations which were deemed extra-hazardous, and was general in its application as to those occupations. It had been passed after a long and careful investigation by a Commission on which all parties who were interested in the enactment of such legislation were represented. Doubts had been expressed all along as to its constitutionality, and so the question was raised and decided with as little delay as possible. The case in which it was raised was one in which the plaintiff sought to recover the benefits provided in the law from the defendant for disability by injuries sustained during the course of his employment, by one of the risks of the employment. The answer of the defendant admitted all of the allegations of the plaintiff's complaint, but raised the question of the constitutionality of the law. To this answer the plaintiff demurred and so the issue was raised. The Appellate Division of the Supreme Court sustained the demurrer, and an appeal was taken to the Court of Appeals, where the decision was reversed and judgment entered for the defendant on the ground that the law was unconstitutional.

Several specifications were made as to why it was claimed that the law was in violation of the constitution, the principal of which were the classification of occupations, by which some industries were made subject to the operation of the

w while others were not; the fact that the right of trial by ry was taken away; and the allegation that the establish- mt of an absolute liability on the part of an employer is a deprivation of property without due process of law. ie court overruled the objection based on the classification occupations, holding that such classification was a proper ercise of legislative discretion as long as it was uniform d applicable alike to all who were within the classes speci- d. There was a difference of opinion among the members the court on the question as to whether or not the law was conflict with the constitutional provisions regarding trial jury, and as a decision on this point was unnecessary the irt did not attempt to decide it. The court held that the v was unconstitutional because "in its basic and vital itures the right given to the employee by this statute does t preserve to the employer the 'due process' of law guaran- id by the constitution, for it authorises the taking of the iployer's property without his consent and without his ilt." The court was unanimous in the decision on this int.

The Supreme Court of Washington later in the same year, September 27, 1911, in the case of *State ex rel. Davis-nith Co. v. Clausen,* 65 Wash. 156; 117 Pacific, 1101; held the constitutionality of an act of the Washington gislature, Chapter 74, Laws of 1911, which was similar principle to the statute overthrown by the New York Court Appeals. This law was a compulsory compensation law plicable to certain enumerated extra-hazardous employ- mts, which established a state controlled fund for the in- rance of the compensation obligation. The same general jections were raised to this law that were raised to the w York law. The court overruled all of these objections, lding that the law was a proper exercise of the police power,

that it did not violate the right of trial by jury guaranteed by the constitution, and that it was not a deprivation of property without due process of law. The court noted the decision of the New York Court of Appeals in the *Ives case*, and stated that it was unable to yield consent to the view there taken.

The decision of the court was unanimous, but there are indications that there might have been a dissent if one of the justices had considered that the issue of the constitutionality of this legislation was fairly and properly before the court for decision. The case as presented did not involve the rights or obligations of any employer or employee under the law. It was a mandamus proceeding to compel the State Auditor to issue a warrant on the State Treasurer in payment of an obligation incurred by the Industrial Insurance Department in the execution of the law, but for purposes collateral to its main object. The majority of the court held that the issue of the constitutionality of the statute could be raised in this proceeding, and that it was properly before them for decision, but Justice Chadwick stated in a concurring opinion that the case was a "moot case, pure and simple, and that the right of the relator to recover is in no way affected by the constitutional questions raised by the parties and discussed by the court." It is to be regretted, therefore, that the issue decided was not clearly and directly before the court, for although the result would have been the same in that the law would have been upheld, possibly by a divided court, the decision would have been entitled to greater prestige if it had not been made on a collateral issue.

In the meantime a device had been evolved which was to become the basis of the compensation legislation in the United States, that would stand the test of constitutionality. It is yet too early to predict whether or not this will be the per-

manent basis of our compensation legislation, but it is the basis on which the laws in the greater number of the states now rest and it is peculiar to this nation because of our constitutional situation, and so it is distinctively American. It is the principle of elective or optional compensation, and is in fact but an extension of the principle which had already been permitted by law in Massachusetts and New York, but it is in practice effective while those laws were ineffective because while in form voluntary it penalises the employers and employees to such an extent for failure to elect compensation that it appears that it is manifestly to the advantage of both to elect the provisions of the system. Thus at one stroke the constitutional objections to a compensation system are eliminated, and the election is made so attractive to the interested parties in comparison with a failure or refusal to elect that the defects in a system which is wholly voluntary and carries no penalties for a failure to elect are obviated.

This principle was first adopted in the legislation which was passed in 1911. In that year several states passed compensation laws which embodied the idea of elective compensation, but which in effect made it practically compulsory for both employers and employees to elect the law, and the principle upon which those laws are based has with a single exception stood the test of constitutionality. The basis of the principle is that it is left optional with both employers and employees as to whether they shall accept the provisions of the law. If an employer does not elect to pay compensation according to the terms of the law the defences of assumption of risk, contributory negligence, and the fellow-servant defence, are removed and are not available in bar of any claim which an employee may bring against him for an occupational injury; if in turn the employee rejects the bene-

fits of the law after an employer has accepted it the employer has the right to establish any of the common law defences in bar of a claim which may be made by the employee for injuries received during the course of his employment.

The adoption of this principle has been criticised as a piece of legislative trickery, in that the election while in theory voluntary is in fact compulsory, for with the defences removed from the employer practically the only element remaining when a claim is made against him by an injured employee is that of the assessment of damages, and with the defences still available against an employee who fails to elect that employee when injured would have to prove his case and establish the liability of the employer in accordance with all of the common law rules, so the employee by electing to abide by the provisions of the law may be compelled to forego valuable rights in cases where he may be injured by the negligence of the employer for the much smaller benefits specified in the compensation law. The result was, however, that this elective system was recognised as a practical and feasible method of relief from the defects of the common law system, and as the constitutionality of the principle was upheld the spread of such laws was rapid and they were accepted generally by those subject to their provisions.

While the voluntary compensation law was pending in the Massachusetts General Court, after it had passed the House and had been sent to the Senate for action, the Senate called upon the Justices of the Supreme Judicial Court for their opinion as to the constitutionality of this legislation. The Justices submitted an opinion in response to this request in which they stated that they believed that the proposed law was a valid exercise of legislative power. *Opinion of the Justices*, 209 Mass. 607; 96 N. E., 398. Two questions were submitted: first, as to whether or not the bill was in

conformity with the constitutional provision forbidding the deprivation of property without due process of law; and second, as to whether or not the bill was in conformity to the Fourteenth Amendment to the Constitution of the United States. Both of these questions were answered in the affirmative. In their opinion in considering the removal of the defences the Justices distinguished between contributory negligence as the term is ordinarily used and negligence which amounts to serious or wilful misconduct on the part of the employee, and they held that the law would be constitutional on the assumption that the defence removed in event of the failure of the employer to elect the law was the defence of contributory negligence in its usual meaning. They expressed no opinion as to the constitutionality of the law if this term was otherwise construed.[1]

[1] The provision in the Constitution of Massachusetts by virtue of which the Justices of the Supreme Court can be called upon to express opinions in matters which are not in litigation is not a general constitutional provision, but is confined to the Constitution of Massachusetts and a very few other states, and it is a well recognised rule that the judiciary cannot be called upon to give such opinions except by the authority of such a constitutional provision. In the Massachusetts Constitution the provision appears in Chapter III, and is as follows:

"Section II. Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."

While these opinions do not have the same weight as decisions rendered in the determination of cases in litigation, still they are entitled to respect when the opinions expressed are apparently sound conclusions of law. The courts do not regard them as of any binding authority, and so do not hesitate to review in actual litigation any questions upon which they may have expressed an opinion in conformity with this constitutional provision, but it is a significant fact that when such questions arise in litigation after such an opinion has been given that the decision is usually in harmony with the opinion. Note the case of *Young v. Duncan*, and *Madden's* case, cited in this chapter.

The issue of the constitutionality of the Massachusetts law was later raised in actual litigation in the case of *Young v. Duncan,* 218 Mass. 346; 106 N. E., 1; and in *Madden's case,* 222 Mass. 487; 111 N. E., 379, and the law was upheld in both cases. In the case of *Young v. Duncan* the plaintiff, an injured employee, attempted to recover at common law after a decree for compensation had been entered at the instance of the employer, the basis of her claim at common law being the allegation that the employer had not accepted the compensation law in accordance with the formalities required, and that the law was unconstitutional. It was held that the employer had duly accepted the law as far as the rights of the employee were concerned, and that the law was constitutional. The court referred to the *Opinion of the Justices,* supra, which had been given while the bill was pending, and stated that that opinion was merely advisory in character and proceeded to examine the question of the constitutionality of the act in the light of the argument in this case. This issue was also raised in *Madden's case,* and it was held that the act was not a deprivation of property without due process of law because it was wholly optional with the employer, as it was with the employee, as to whether or not he should come within the provisions of the act or stay outside of it and stand on his legal rights.

The question of the constitutionality of the elective compensation law of Wisconsin, Chapter 50, Laws of 1911, was brought before the Supreme Court of that state in the case of *Borgnis v. Falk;* 147 Wis. 327; 133 N. W., 209; and the court decided in favour of the validity of the law. This was an action brought by certain employees against their employer to restrain him from electing to operate under the law during the contracts of employment of the complainants, and although this specific issue might have been

disposed of without any decision as to the constitutionality of the law, in view of the exigency the court held that this question could be properly raised in this case and proceeded to pass upon it. The court held that the law was not unconstitutional in depriving employers who failed to elect it of their common law defences, because those defences were simply rules of the common law which were guarded by no constitutional provisions. It was also held that the law was not unconstitutional as a deprivation of property without due process of law.

Decisions have been rendered in several other states in which voluntary compensation laws were held to be constitutional, but as these decisions were based on the same grounds as those in the Massachusetts and Wisconsin cases their citation would only be cumulative. The principle upon which the laws have been upheld is that they authorise, in theory at least, a voluntary contractual relation between the employer and his employees to substitute this system for the common law system, and that in the removal of the defences from the employer if he does not see fit to elect the system the legislature is interfering with none of his constitutional rights; the situation of the employee, however, in relation to his existing rights, is not altered by his failure or refusal to elect the law, for it simply leaves those defences available against him in any action that he may bring which were already available against him.

While there is no uniformity in the different laws as to the manner of election by the employer, there is substantial uniformity in principle in that election must usually be effected by some affirmative act on his part, such as the filing of notice of election with some state official, or if the election is implied it must be consummated and evidenced by some affirmative act, such as the insurance of the compensa-

tion obligation as required by the law, the posting of notices of election in his working places, or by some other formality. The general principle which runs through the laws is that after the employer has elected the law by compliance with the required formalities the employee is held to have elected by implication unless he files notice of rejection in the manner prescribed in the law. This method of election passed unchallenged until the Kentucky law, Chapter 73, Laws of 1914, was declared unconstitutional by the Court of Appeals of Kentucky in the case of *Kentucky State Journal v. Workmen's Compensation Board,* 161 Ky. 562; 170 S. W., 1166.

The Kentucky law was a voluntary compensation law, under which the election of both employer and employee was by implication, but after electing the law the employer was obliged to post notices in order to advise the employees of his election and give them the opportunity to reject if they desired to do so. The situation in Kentucky was somewhat different from that in some of the other states, because of Section 54 in the state Constitution which prohibited the General Assembly from placing any limit on the amount of recovery for injuries resulting in death, or for injuries to person or property, and Section 241 which provided that in every case of injury by negligence or wrongful act the injured should have a right to recover damages from the person causing the injury. The case in which the constitutionality of the law was raised and determined was a mandamus proceeding brought by the Workmen's Compensation Board against the Kentucky State Journal Co. to compel that company to file certain returns required by the law. A demurrer to the petition was filed on the ground that the law was unconstitutional, but this demurrer was overruled in the Circuit Court and an appeal taken to the Court of

Appeals, where the law was declared unconstitutional by a divided court, four of the Justices holding against the law and three in favour of it.

The law was held unconstitutional on the ground that the election which was in theory voluntary was in effect compulsory for both employer and employee, and as such was a deprivation of property without due process of law. It was also held that the law was in conflict with both Section 54 and Section 241 of the Constitution of Kentucky. The court observed that it was within the power and right of an employee to waive by contract the provisions of Section 54, prohibiting any limit on the amount of recovery, if the contract was freely and voluntarily made, but the acceptance of the law by implication was not such a voluntary contract. That part of the law which limited the right of compensation in fatal cases to surviving dependents was in violation of Section 241, which allowed such actions to be prosecuted by the personal representative of the deceased, for it was held that the Legislature had no right to limit the recovery for the death of an employee by the negligence of the employer to the dependents of the deceased employee.

When any provision appears in a state constitution limiting the power of the legislature to place any restrictions on the amount of recovery for death resulting from wrongful act, such as that in the Constitution of Kentucky, it places a limitation on the passage of any compulsory compensation law which shall apply to fatal cases, so when the compulsory law of Oklahoma, Chapter 246, Laws of 1915, was passed, it was specially provided, Article VI, Section 1, that the law should not apply to accidental injuries which resulted in death. This was because of a provision in the Constitution of Oklahoma, Article XXIII, Section 7, which prohibited the Legislature from placing any limitation on such re-

covery. The Oklahoma law, therefore, as it now stands applies only to non-fatal injuries, but by a Joint Resolution, approved March 15, 1915, the Legislature of Oklahoma proposed an amendment to the Constitution of the State which would amend this constitutional provision so that the compensation law could be made applicable to fatal as well as to non-fatal injuries.

In several of the states provisions have been inserted in the constitutions authorising the legislature to pass a compulsory compensation law. Such provisions have relieved the situation as far as any conflicts between compulsory laws and other provisions of the state constitutions are concerned, but it has been regarded as doubtful as to whether those provisions were not in conflict with the Constitution of the United States.[1] The basis of this contention was that the Fifth Amendment protected the deprivation of property without due process of law, the Seventh Amendment preserved the right of trial by jury, and the Fourteenth Amendment prohibited any state from abridging the privileges or immunities of citizens of the United States. There seemed to be some doubt, therefore, as to the validity of these provisions in the state constitutions, but this issue has recently been determined by the Supreme Court of the United States in favour of the validity of such provisions.

This decision was in the case of *New York Central Railroad Co. v. White,* decided on March 6, 1917. In that case

[1] The general tenor of these constitutional provisions is permissive, in that they specify that the different legislatures *may* pass compulsory compensation laws rather than that the legislatures *shall* pass such laws. California, Article XX, Section 21; New York, Article 1, Section 19; Ohio, Article II, Section 35; Pennsylvania, Article 3, Section 21; Vermont, Article 32. In some states, however, these provisions are mandatory. Arizona, Article XVIII, Section 8; Wyoming, Article 10, Section 4.

the validity of the amendment to the New York constitution was in question. The New York courts had decided in favour of the amendment, and the case was taken to the Supreme Court of the United States. This court decided that the compulsory scheme of workmen's compensation was not in conflict with the Fourteenth Amendment, and that the compulsion to insure the obligation required in the law was a valid exercise of legislative power. On the same day the court handed down decisions in two other compensation cases. In *Mountain Timber Co. v. Washington,* the validity of the compulsory workmen's compensation and state insurance law of Washington was sustained, and in *Hawkins v. Bleakly,* the validity of the elective law of Iowa was sustained, so it appears that the question of the validity of the workmen's compensation principle, whether the law be compulsory or elective, is now at rest because of the action of the highest court in the land.

A number of different compensation laws make their application depend upon the number of employees in the service of an employer, the law applying only to those who have a specified number of employees or over. This principle of classification according to the number of employees has been attacked as unconstitutional, but it was upheld by the Supreme Court of the United States in the case of *Jeffery Manufacturing Co. v. Blagg,* 235 U. S. 571. That was an action brought by an employee against an employer in Ohio who had failed to elect the Ohio Compensation Law, which applied to all employers who employed five employees or more and removed the common law defences from those employers who were subject to it and failed to accept its provisions. The law was attacked because of this discrimination, but it was held that the classification was not of an arbitrary and unreasonable nature and that the law was valid.

REFERENCES

The cases in which the question of the constitutionality of compensation laws has been passed upon constitute the primary authority in this matter, and several of the principal cases have been cited in this chapter. A number of articles and discussions of cases have appeared in the different law reviews from time to time, and the reader is advised to consult any files of any law reviews that may be available. A few references in which this question has been discussed are given herewith: —

Brief of Carmen F. Randolph, New York, November, 1910. Printed in Senate Document No. 338, 62d Congress, 2d Session, (Report of the Employers' Liability and Workmen's Compensation Commission), pages 1395–1473.

The Constitutional Problems of Workmen's Compensation, W. D. Lewis, Risks in Modern Industry, page 119.

Opinions of the Courts, Workmen's Compensation and Employers' Liability, Senate Document No. 475, 62d Congress, 2d Session. (This is a compilation of the different workmen's compensation cases that had been decided at the time that the compilation was issued, March, 1912.)

Constitutional Status of Workmen's Compensation, Ernest Freund, American Labor Legislation Review, Vol. II, page 43.

The Constitutionality of Workmen's Compensation and Compulsory Insurance Laws, M. M. Dawson, 22 Case and Comment, page 275.

Compulsory Workmen's Compensation Laws, L. C. Williams, 22 Case and Comment, page 296.

CHAPTER VII

COMPENSATION LEGISLATION IN THE UNITED STATES

The compensation legislation of the United States is peculiar to this country. While the agitation for the adoption of the compensation system was in progress extensive investigations of the systems in operation in other countries were made both by official bodies and by students who had no official connection with the agitation, in order to get the benefit of the experience of the other countries and in the endeavour to ascertain whether or not any of the systems were adaptable in whole or in part to the conditions in this country. The result was that although no one of the foreign systems was adopted as a whole some of the features of several different systems were adopted, so that while our compensation system is original in many particulars, and in the adaptation of the features which it has adopted from other systems, it may be said that it is in general harmony with the system as adopted in the other nations.

At the end of 1916 compensation laws were in force in two-thirds of the states of the United States, and a law had been passed by Congress establishing a compensation system for government employees. This proportion does not express the exact situation, for although it shows that the greater number of the states were committed to the compensation principle it does not in itself show that practically all of the most populous states, and the large commercial, industrial and manufacturing states, have passed those laws,

so that by far the larger proportion of the workingmen of the country are subject to the operation of the laws. It may be said, as a general statement, that all sections of the country with the exception of the south are committed to the principle. While some of the southern states have passed compensation laws, the south as a whole has not adopted the principle. This is not because the change from the common law system has met with any more opposition in the south than it has in the other sections of the country, but it is due to the fact that the south is naturally conservative in matters of social and economic reforms, and also to the fact that because the south is still more of an agricultural than a manufacturing community the problem of the liability of the employer for industrial accidents has not become so acute as it has in those communities where manufacturing interests predominate.

The rapidity with which the compensation principle spread is easily comprehended when it is noted that the first laws to stand the test of constitutionality were passed in 1911, and that within a period of less than six years the greater number of the states had passed compensation laws, so that territorially the larger part of the United States was under compensation and numerically the larger part of the population. In addition to this action on the part of the legislatures in the different states, the people in their sovereign capacity in some of the states had incorporated the principle in the fundamental law by adopting constitutional provisions which either permitted or commanded the legislature to pass compensation laws. The different compensation laws have, as a general proposition, been accepted in the several states by those who are subject to their operation in a spirit of willingness to give the system a fair trial, and with minor exceptions it may be stated that the system is

now in operation nearly all over the United States as a practical and effective system.[1]

It has already been noted that while the compensation legislation in this country is in harmony with the general principles of the workmen's compensation system as recognised in the civilised world, it is in many respects peculiar to itself. This is because the system in one country may not be adapted as a whole to the conditions in another country, and as the conditions in this country were different from those in other countries certain changes in the systems in use in other countries were necessary before any system could be adopted in the United States. The experience in other countries has suggested changes in the system which might be made when such a system is to be inaugurated in a country which has not hitherto adopted it, and so many variations were made in the existing systems when the system came to be adopted in the different states in this country.

The legal situation and the industrial conditions in the United States bear a closer resemblance to the corresponding conditions in England than to those in any of the other countries in which a compensation system was in force while the agitation was in progress in this country, so it was but natural that those parts of the English system which were adaptable to this country should be adopted, but the English

[1] New Hampshire is practically the only state which is nominally a compensation state but is in reality a common law state. This is because the compensation law is ineffective, and this condition may be attributed to one of two causes, either that those who drafted the law were not cognisant of the principles which should have been incorporated in it in order to make it effective, or that they were cognisant of those principles and purposely drew a law which would be ineffective. The law is defective in several essential particulars. The employee is allowed to elect after an injury whether to accept compensation or rely on his common law rights, and this defect is sufficient, as experience has shown, to render any compensation law inoperative.

system had some weaknesses which might have rendered the system nugatory in some particulars if adopted in the United States. These defects could be corrected by borrowing and adapting some of the features of the German system and this action was taken in drafting many of our laws, so that as our system now stands it may be said that it is an adaptation of the English and German systems. As to form and substantial provisions many of the laws in this country are based on the English law, while as to the security of the compensation obligation and the administration of the laws it may be said, as a general proposition, that the provisions of a number of our laws, particularly those which make insurance compulsory and provide special administrative machinery, are adapted from the German system.

While there are many variations as to the details of the compensation laws in the different states the general principles which run through the laws are uniform, and it is on the basis of the principles on which the laws rest rather than on the variations in the details that the general proposition of our compensation legislation must be considered. The classification which is made for the purpose of analysis of the compensation legislation in the United States is along two broad and general lines, and is according to the nature of the laws and according to their application.

In attempting to classify the laws according to their nature it appears that there are two general classifications, those which are compulsory and those which are elective. Compulsory laws have been passed in the states in which the constitution either directs or permits the legislature to pass such laws, and in some other states where although no such constitutional provision exists the legislature, in the exercise of the police power, has assumed the authority to pass a compulsory law. A law of this nature leaves no option

with the employers and employees who are subject to its operation but to comply with its provisions. Certain penalties are usually specified for employers who neglect to comply with the provisions of such laws in order that their operation may be effective. About one-third of the laws are of the compulsory type, so they are in the minority.

The greater proportion of the laws, approximately two-thirds of the whole number, are elective, so the elective law is at the present time the distinctive national type. This form, as noted in the preceding chapter, was devised to obviate the constitutional objection to the compulsory law, and in its historical aspect it is an evolution from the rule of the common law which allowed an injured employee to accept benefits specified in a pre-existing agreement between the employer and the employee in lieu of damages. The next step was the legislation which permitted such an agreement, but which was inoperative because of the failure of both employers and employees to accept the provisions of this legislation, and then the elective compensation laws, which contained provisions that made their acceptance more advantageous to employers and employees as a whole than the continuation of the common law system, and so were effective.

The methods of election vary in the different states. The election by the employer may be express, or it may be by implication in that he is supposed to have accepted the provisions of the law unless notice of rejection is given in the manner specified in the law. When the election is express it is usually signified by filing notice of the election with some state authority, and by compliance with any further formalities that may be required, such as the insurance of the compensation obligation, the posting of notices of election in working places, etc. Even if the election itself is

by implication in that no formalities are required to perfect it, notice of such election must usually be given to employees so that they may reject the law if they desire to do so. The election by the employee is usually by implication, for he is held to have elected the law after notice of election by the employer unless he files notice of rejection in the manner specified in the law. In order that the nominal freedom of election and rejection may be preserved the laws all provide methods by which either an employer or an employee may reject the law after he has accepted it, or may accept it after rejection.

According to their application the compensation laws may be divided into two classes, those which are limited to specific occupations or classes of occupations, and those which are general in their application. The principle on which the distinction is based in those states which have enacted limited compensation laws is that some occupations are essentially hazardous to life and limb, and that the common law system of employers' liability is antiquated and inadequate when applied to those occupations, so the substitution of a compensation system is necessary, but as to those occupations which are non-hazardous, and which do not involve any special dangers to employees, the common law rules are still sufficient and there is nothing inequitable in compelling an employee to rely upon his common law rights for any occupational injuries which he may receive. Taken as a class it may be said that the compulsory laws are limited in their application, while the elective laws are of general application. This statement is subject to exceptions, for some compulsory laws are general, while some of the elective laws are of limited application.

The states which adopted the principle of a limitation in the application of their compensation laws were only fol-

lowing a precedent which had been set by other countries in the enactment of compensation legislation. The first law passed in Germany was limited, and the English act of 1897 was also limited. The German law has been amended so as to make it practically unlimited in its application, and the English law is now unlimited. The tendency is evident, therefore, in other countries to remove the limitations, and there seems to be no reason to believe but what the limited laws which have been passed in this country will sooner or later give way to laws which are general in their application. The limited laws usually provide that employers and employees who are not subject to their operation may accept the terms of the law by agreement as a substitute for the common law system, but no penalties are attached to a refusal to accept their provisions.

The limited laws vary in detail. Some name a large number of specific occupations which they designate as hazardous or extra-hazardous to which the compensation principle shall apply; others do not name the specific occupations with as much detail but designate the occupations by classes. The basis of the distinction between hazardous and non-hazardous occupations which runs through the laws is that as to those which require work in proximity to power-driven machinery; or in places where explosives are used or where chemical contact is necessary; or in construction work above the ground, under the ground, or in sub-aqueous operations; or in short in all occupations in which there seems to be any special dangers involved, it seems that the common law system is inadequate, while there seems to be no necessity for a change in the common law rules as to those occupations which do not seem to possess any special dangers.

There are certain limitations on the application of practically all of the compensation laws which are general in

their application, but these limitations are of a minor nature as compared with the scope of the operation of the laws. Some of those laws for the purpose of exempting small employers provide that they shall not apply to employers who employ less than a certain number of employees, such as five or ten. The exemption of domestic service and farm or agricultural labour is almost universal. Domestic service is exempt because it is supposedly non-hazardous in its character, but the exemption of farm or agricultural labour cannot be justified on that ground. Viewing that exemption from the practical standpoint the only conclusion which can be reached is that the influence of the agricultural interests as a class was so strong with the different legislatures that they hesitated to place any such burdens on agricultural operations, and so this exemption was inserted in practically all of the laws. The same practical considerations have also secured specific exemptions for certain local interests in some laws, which exemptions are peculiar to those laws and rest upon no other basis than that of expediency, for the refusal to allow such an exemption might have prevented the passage of a compensation law.[1]

[1] Some of these exemptions may well be noted in order to show the influence of these local considerations in the adoption of the compensation principle, and it may be noted that these considerations apply alike to limited laws and to general laws. The first Kentucky act, Chapter 73, Laws of 1914, was a limited act, naming a large number of specific occupations to which the law was applicable, but a close examination of the enumeration fails to disclose the fact that *distilleries* were subject to its operation. The Texas act, Chapter 179, Laws of 1913, specifically exempts *cotton gins* from its operation. Part I, Section 2. The operation of a cotton gin involves a number of dangers to employees, so the exemption cannot be justified and it can be explained only on grounds of expediency. An exemption appears in the Maine act, Chapter 295, Laws of 1915, in Section 4, by virtue of which "*the work of cutting, hauling, rafting or driving logs*" is exempted from the operation of the act. It is reported that the interests thus exempted

In order that any question of constitutionality because of conflict with federal jurisdiction may be avoided it is usually provided in the laws that they shall not apply to any operations directly involving interstate or foreign commerce, for this is a matter over which Congress has jurisdiction. These operations are confined to the transportation of persons or things from one state to another or to commerce between this country and foreign countries, so as to the business of transportation the compensation laws apply, as a general rule, only to those operations which are conducted wholly in one state, and which are, therefore, a matter of state rather than of federal control.

In their operation the laws apply to accidental injuries received by employees in the course of their employment and arising out of it. An exception appears in a number of the laws which exempts casual employment, or employment not in the course of the employer's regular business. A very practical problem which has arisen in addition to the industrial accident in modern industrial life is that of the occupational disease. This has not as yet been generally recognised as covered for compensation under the present compensation laws, but this is probably only a temporary condition, for the tendency seems to be to include coverage for disease if such disease is in any way connected with accidental injuries arising out of employment, so the eventual coverage of occupational diseases for compensation, either by express legislation or by construction of the law, may be regarded as only a logical development. There is, in fact, no logical reason why compensation should not be paid for disability arising from disease caused by occupational

were strong enough to prevent the enactment of a compensation law in 1913 when exemption was denied to them, so this exemption was inserted in the law of 1915 in order to avoid their opposition.

hazards the same as it is paid for disability arising from accidents sustained in the course of employment.[1]

[1] The language of the larger number of the compensation laws in the United States limits their application to "personal injury by accident," and this language negatives the idea of any intention on the part of the different legislatures to make the laws apply to occupational diseases. This limitation is taken from the English act, but that act contains provisions which relate to certain occupational diseases, and it also contains a provision which authorises the Secretary of State to extend the application of the act to other diseases, so that act can be made to cover occupational diseases by executive order. Such a provision in any of our acts would doubtless be unconstitutional, because it is essentially a delegation of legislative power.

The Massachusetts act has been extended by construction to cover occupational diseases, and that is the only law, with the exception of the Federal law, which as it was originally passed, has been so interpreted. This construction was given to the law because of the fact that it was made to apply to "personal injury" and was not limited to "personal injury by accident," as was the case with the English law and most of the laws in the United States. The court held that the disability arising from an occupational disease was a personal injury and that as the legislature had not limited the application of the law to personal injury by accident there was no question but what it was the legislative intention to have the act apply to occupational diseases as well as to industrial accidents. *Hurle's Case*, 217 Mass. 223, 104 Northeastern 336; *Johnson's Case*, 217 Mass. 388, 104 Northeastern 259. The Supreme Court of Michigan reached a different conclusion in the case of *Adams v. Acme White Lead and Color Works*, 182 Mich. 157, 148 Northwestern 485, and held that occupational diseases were not covered under the Michigan act, for although the language used in the law was the same as that used in the Massachusetts law, in that the words "personal injury" and not "personal injury by accident" were used, it was held that it was the intention of the legislature to limit the application of the act to industrial accidents and that coverage of occupational diseases was not contemplated.

It was at first held that occupational diseases were not covered under the law extending the compensation principle to Government employees, the Act of May 30, 1908, 35 Statutes at Large, 556. *Trieman's Case*, Opinions of the Solicitor, Department of Labor, Workmen's Compensation Cases, page 204. This ruling was later overruled and it was held that occupational diseases were covered. *Jule's Case*, ibid., page 261. The recently enacted Federal compensation law, the Act of September 7, 1916, Public No. 267, 64th Congress, applies to

It is not the intention of the compensation system to put a premium on wilful or intentional negligence on the part of an employee, so it is usual to exempt injuries received by reason of the intentional or gross or wilful negligence of the injured from the operation of the law. If it can be shown, therefore, that the injuries were received because of negligence of this nature the injured would have no redress, for the compensation law does not provide indemnity and the injured could not establish any rights at common law. Some of the laws give additional rights to an employee who is injured by the gross, wilful or intentional negligence of the employer, or because of his violation of statutory requirements for the safety of employees, but there is no general principle running through our laws governing such cases. The rights given to the employee in cases of this nature may consist of an additional percentage to the compensation specified in the law, or the option on the part of the employee to waive the provisions of the compensation law and proceed against the employer at common law. It is considered, however, that the better compensation practice in cases where an injury is caused by the wilful or intentional negligence of the employer, or by his failure to provide the safeguards required by statute, is not to allow the

"personal injury sustained" while in the performance of duty, so under the analogy of the rulings as to the effect of the prior law and of the Massachusetts cases there seems to be no question but what the language is broad enough to include occupational diseases.

The California Commission held in *DeWitt's Case*, 1 California Decisions, Part II, page 170, that occupational diseases were not within the scope of the compensation law, because the legislature evidently did not contemplate such coverage. The law was amended in 1915 by substituting the word "injury" for the word "accident" wherever it occurred, and by substituting the words "suffering of an injury" for the "happening of an accident," so the law may now be construed to include occupational diseases.

employee any additional rights but to provide a penalty which shall be enforced by the state when such facts are shown.

There are three underlying principles which must be observed in order that a compensation law may be effective. The nature and the amount of the indemnity, when the right to receive it has once been established, must be certain; the payment of the indemnity must be secured; and the law must be administered so that disputes which may arise under it are determined with as little delay as possible and its provisions carried into effect. The principles which relate to the security of the payment of compensation and to the administration of the laws will be discussed in subsequent chapters; the balance of this chapter will be devoted to the principles relating to the indemnity provided in the laws.

The first element which must be noted in discussing the indemnity provisions of the compensation laws is the difference in principle between the damages allowed by the common law system and the indemnity payments allowed by the compensation system. It cannot be contended that the indemnity provided by compensation is the theoretical equivalent of the damages which are assessed in liability cases under the common law, for the indemnity in compensation is not compensatory in the sense of common law damages, because the damages allowed in common law actions are in theory the monetary equivalent of the injuries sustained, while the theory of compensation is that the indemnity provided is for the purpose of keeping the injured and his dependents from want and is in no sense the monetary equivalent of the loss which has been sustained.

Under compensation, therefore, the employee is obliged to forego the common law right to recover compensatory dam-

ages in cases of legal liability for the right to receive a definite and certain indemnity in all cases, except those in which the injury and the resulting disability is caused by his own wilful misconduct or intentional negligence. The employer in return is obliged to pay the indemnity in all cases to which the law applies. This situation involves concessions from both, for the employee has to make a substantial concession when he is deprived of his common law rights in cases where the employer is liable for his injuries, and the employer is obliged to assume substantial burdens when he has to pay compensation for all injuries caused by industrial accidents. The concession of the employee may be regarded as the consideration for the assumption of this burden by the employer, and on the other hand the liability of the employer to pay compensation in all cases may be regarded as the consideration for this surrender of his common law rights by the employee.

A principle which is found in practically all of the compensation laws in force in the United States is that no compensation shall be paid for a certain definite time after the beginning of the disability. This space, which is known as the "waiting period," is not over two weeks in any of the laws, and the tendency is to reduce it to one week, or even less, but not to eliminate it altogether. This principle is taken from the English law, but its application in the greater number of our laws is a little different from its application in England, for the English law provides that the employer shall not be liable for any injury which does not disable the workmen for at least one week, and that if the incapacity lasts less than two weeks no payment shall be made for the first week of incapacity, so if the incapacity lasts longer than two weeks the disability payments are from the date of the injury. The waiting period in the majority of the

laws in the United States is a period during which no compensation is paid. The indemnity provisions of the laws are not effective unless the disability lasts beyond the waiting period, and the payments are for the disability after the expiration of the waiting period.[1]

The purpose of this provision establishing a waiting period is to prevent an accumulation of small claims for minor injuries, and to prevent the malingering which might be an incident of such small claims, for it is assumed that many claims of that nature would be made if the compensation laws paid indemnity for short periods of disability, and that there would be a tendency on the part of injured workmen to prolong the disability as much as possible in such cases. The German system has met this situation by providing that the payments for the first thirteen weeks of disability shall be made from the sick funds, to which the greater part of the contributions are made by the employees, so that they themselves bear the larger part of the burden of the payments which are made in cases where the disability is short and temporary. The English and the American systems

[1] In some states the waiting period is eliminated if the disability lasts for a specified time, but is effective if the disability does not last beyond the period specified. In some other states there is no waiting period as such but no indemnity is paid unless the disability lasts beyond a specified time, in which case indemnity is payable from the beginning of the disability. Michigan, Nebraska, and Wisconsin may be cited as examples of the former class. The waiting period in Michigan is two weeks, but if the disability continues beyond eight weeks compensation is payable from the date of the injury. The provision is the same in Nebraska as it is in Michigan. In Wisconsin the waiting period is one week, but if the disability lasts more than four weeks the indemnity is payable from the date of the injury. Arizona and Kansas are examples of the latter class. In Arizona no payment is made for disability which lasts less than two weeks; if the disability lasts more than two weeks compensation is payable from the date of the injury. In Kansas the provision is substantially the same as in Arizona. In Oregon and Washington there is no waiting period.

could not meet the situation in that way, so the principle of the waiting period was adopted.

A provision which is practically universal in the compensation laws which have been passed in the United States is that the employer shall provide medical and surgical aid for an injured employee. This obligation may be unlimited, in that the employer is required to furnish all such aid as is necessary during the entire period of disability, or it may be subject to some limitations. These limitations may be as to the time during which such aid shall be furnished, the amount of the expense for which the employer shall be liable, or there may be limitations as to both time and expense. Certain limitations are found in most of the laws, but the tendency to increase the obligation, as the effects of the limitations are called to the attention of the legislatures, is noticeable. In some states where the obligation was at first limited the limitations have been removed, and it is safe to predict that many of the other states will follow this precedent.[1]

[1] The amendments removing the limitations on "statutory medical aid," as this obligation is called, have taken two forms. One form removes the limitation in all cases, while the other gives the administrative authorities discretion to order such services beyond a specified period in cases where it is deemed necessary. Connecticut is an example of the former procedure, Massachusetts of the latter. The Connecticut law as passed in 1913 provided for statutory medical aid for thirty days following the injury, without any limitation as to the amount of the expense for it; the law was amended in 1915 so that the employer is now required to provide all such services as may be deemed reasonable and necessary. In Massachusetts the law as passed in 1911 provided for statutory medical aid for two weeks, without any limitation as to the amount; in 1914 the law was amended so as to permit the Industrial Accident Board to order treatment for a longer period in unusual cases. The method adopted in Massachusetts may be regarded as preferable to that in Connecticut, for this is a provision of the law which must be carefully administered in order to prevent its cost from becoming excessive, so it is advisable to require the admin-

This principle, as far as its origin can be ascribed to any foreign precedent, may be considered to be an adaptation of the provision in the German system which requires that such aid shall be furnished to an injured employee. Under that system the obligation is unlimited, but the expenses for the first thirteen weeks come from the sick funds, to which the employees themselves contribute the larger part, and then from the accident funds, which are supported wholly by the employers. The English law makes no provisions for any such expenses except in fatal cases where no dependents survive. The common law recognised no such obligation, but the expenses of medical and surgical attendance, etc., which an injured workman had to incur on account of his injury were elements to be considered in the assessment of damages if any recovery could be enforced against the employer. The reason for this provision is apparent. One of the objects of compensation is the conservation of human resources, and it is an important element in the accomplishment of this object that proper medical and surgical attention be given to injured employees. Any compensation law, therefore, which does not provide for adequate statutory medical aid is defective in one of the essential particulars of the system.

The disability recognised by the compensation laws in non-fatal cases is of two kinds, total and partial, each of which is divided into two classes, permanent total disability and temporary total disability, and permanent partial disability and temporary partial disability. In fatal cases the compensation payments are for the benefit of the dependents, and two kinds of dependency are recognised, total and partial. The difference in the method of indemnity payments

istrative authorities to pass on cases which may seem to need treatment for a longer period than is specified in the law.

under the compensation system and the payment of damages under the common law system is one of the distinguishing elements of the compensation system, and attention should be called to this principle of the system before consideration is given to the matter of the amount of indemnity allowed by the compensation laws. When damages are assessed in a common law action the amount is determined and then if payment is made it is usually in one sum. This is also the usual procedure in cases where settlements are made without suit. There is nothing in the common law which prevents an agreement between the parties that the damages shall be paid by periodical payments, but the common law system provides no machinery for the administration of such agreements, and so they are rare. The practical effect of the common law procedure was that after the damages were paid in a single amount the money was soon spent in one way or another in the greater number of cases, and the purpose of the payment as to the care of the injured in cases of serious or permanent injuries, or of the dependents in fatal cases, was lost.

The way in which the compensation system obviates this defect in the common law system is by providing that the indemnity which is paid to the injured or to the dependents in compensation cases shall be paid in small amounts by periodical payments, so that the money shall be used for living expenses, and not for any purposes which are merely temporary, or for purposes of investment or speculation. It has already been noted that conservation is one of the essential elements of compensation. Primarily this element of conservation takes the form of protection for the health, lives and limbs of employees by attempting to prevent all accidents which are avoidable, and by attempting to mitigate the physical consequences of those which do occur, but when

indemnity is once payable on account of the disability which has resulted from an accident it is the object of the system to see that the injured or his dependents receive the indemnity for the purpose of mitigating the financial loss resulting from the injury. Experience has shown that this end can best be accomplished by the payment of certain amounts at regular intervals, and so the compensation system has adopted this method of indemnity payments.

The payments made to an injured employee under this system are based upon his average weekly wages, and consist of a certain percentage of the average weekly wages. This percentage varies in the different states, the variation being from fifty to sixty-six and two-thirds per cent. For illustrative purposes the indemnity payments at present allowed by the Massachusetts compensation act will be used in this survey of the benefits provided by the compensation system, for although the different acts vary in detail as to the payments there is a substantial uniformity in principle running through them all, and the payments specified in any one of the laws may well be used as illustrative of the principle.

For total disability, either permanent or temporary, the Massachusetts act provides for a payment of sixty-six and two-thirds per cent. of the average weekly wages, but not more than ten dollars nor less than four dollars a week, during the continuance of the disability, but this provision is subject to the limitation that the payments shall not extend beyond a period of five hundred weeks and that the amount paid shall not exceed four thousand dollars. Most of the laws contain this principle of a limitation as to the compensation which shall be paid, the limitation consisting either of a time limit or a limit as to the total amount, or a limitation as to both time and amount as in the Massachu-

setts law. Such a limitation cannot be defended except on grounds of expediency. The only rational theory on which the compensation system can rest is that if the principle is sound compensation should be paid during the continuance of the disability, or during the dependency in fatal cases, hence any limitation which deprives the beneficiary of compensation after a stated period or after a certain amount has been paid is fundamentally unsound if the principle in itself is sound. The compensation system, however, is such a radical departure from the common law system that in its inception in this country this principle of limitation was adopted in order that the change might not be too drastic. The tendency is as the laws are amended and as new laws are passed both to increase the limits and to remove the limitations altogether, so as time passes this element of unsoundness in our compensation legislation will doubtless be eliminated.

Partial disability may follow a period of total disability or it may be independent of total disability, and it may be either permanent or temporary. The effect of partial disability is to occasion a diminution in the earning power of the injured rather than to stop it altogether, so the compensation which is paid for partial disability is a percentage of the loss in earning power occasioned by the accident and its resulting injury. In Massachusetts the payment is sixty-six and two-thirds per cent. of the difference between the average weekly wages before the injury and the average weekly wages which the injured is able to earn thereafter, subject to a maximum of ten dollars a week and to a limitation of five hundred weeks as to time and four thousand dollars as to amount, the same as in cases of permanent disability.

Permanent partial disability is frequently caused by some

dismemberment which of itself is not sufficient to cause total disability. Two methods of dealing with this situation have been adopted in the compensation legislation in the United States. One is to allow total disability for a certain period for specific dismemberments in lieu of all other compensation; the other is to allow total disability payments for a certain period for such dismemberments in addition to all other compensation, so that in the states in which this procedure has been adopted the injured receives the compensation for specific dismemberments and in addition his compensation for total or partial disability, as the case may be, as long as the disability lasts, subject to any limits as to the time or amount of compensation. This latter procedure is provided in the Massachusetts law. As an illustration of this provision it may be said that in Massachusetts at the present time a total disability payment of compensation for fifty weeks is made for the loss of either hand at or above the wrist or either foot at or above the ankle in addition to the other payments made on account of this injury. In Pennsylvania, for example, a state which has adopted the principle of specific payments exclusively for specific dismemberments, the corresponding payments would be fifty per cent. of wages, subject to a minimum of five dollars and a maximum of ten dollars a week, for one hundred and seventy-five weeks for the loss of a hand and one hundred and fifty weeks for the loss of a foot.

The payment in Massachusetts in fatal cases to those "wholly dependent" on the deceased is sixty-six and two-thirds per cent. of the average weekly wages, subject to the same maximum and minimum and the same limits as to time and amount as in non-fatal cases of total disability. If the dependents are "only partially dependent" the payment consists of the same proportion of the weekly payments for

those wholly dependent "as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury." The provisions for partial dependents cannot be made very definite, so they are necessarily somewhat obscure and considerable discretion must be allowed in the administration of this part of the law. Certain domestic relations are usually specified in the laws which when shown constitute total dependency without any further proof; the matter of dependency, either total or partial, outside of these relations is a question of fact which must be established by sufficient evidence. In cases where no dependents survive the payment is limited in Massachusetts to the reasonable expenses of the last sickness and burial, not to exceed two hundred dollars. It is a general principle in our compensation legislation that when there are no dependents the payments in fatal cases are subject to some such limitations, for in such cases there is no reason why any payments on a compensation basis should be made to persons who were not dependent on the deceased.

The treatment by the compensation system of the cases in which no dependents survive shows the distinction between the method adopted by the common law system of dealing with such cases and that adopted by the compensation system. The common law system originally allowed no recovery in fatal cases, but statutes were passed from time to time which allowed a recovery in these cases and this principle became a part of the system in all common law jurisdictions. While the recovery permitted by these statutes might be primarily for the benefit of the dependents of the deceased, the personal representatives were usually allowed to recover damages on behalf of the estate of the decedent in cases where there were no dependents, this recovery to be distributed according to the statutes regulating

the distribution of estates. Under the compensation system, however, the indemnity payments are for the purpose of avoiding want on the part of those who may be dependent on the deceased, so if there are no dependents there is no reason why any indemnity payment should be made.

While it is one of the fundamental principles of the compensation system that the payments shall be made in small amounts at frequent and regular intervals, in order that the payments may be conserved and the money applied for the purpose for which it was intended, this is not a firm, unyielding, and inelastic rule. This should be the procedure in the vast majority of compensation cases, but it is recognised that there are some cases in which for various reasons it may be advisable that the small payments be commuted into a single payment or several larger payments, so the compensation laws generally have provided for lump sum payments. This provision of the law, however, is not left wholly subject to the agreement of the parties. It is a principle of the administration of the compensation laws that such agreements must be approved by the tribunal charged with the administration of the law before they can be carried into execution, and as it is one of the fundamentals of compensation administration that agreements of this nature shall not be approved unless good and sufficient reasons are shown they are comparatively rare. It is not usual to specify the circumstances under which these agreements shall be made and approved, but to leave those matters to the sound discretion of the administrative authorities.

Some of the injuries on account of which an employee has the right to receive compensation from his employer may arise under such circumstances that the injured has the right to proceed against a third party for the recovery of damages at common law. The compensation system recognises this

n, and it is usual to insert a provision in the laws allows the employee who is injured under circum- which may entitle him to compensation or to damages third party to elect whether to accept compensation or eed against the party responsible for the injury, but tion when once made is final. If the employee elects sation the employer is usually given the right to pro- ainst the party responsible for the injury to recover s, and if the recovery is in excess of the compensation e excess is for the benefit of the injured employee.

inconsistent with the compensation principle that the er should be allowed to relieve himself of the obliga- hich the system imposes by any agreement on the part employee to waive his rights under the compensation the laws usually specify that any such waiver is void. lso usual to provide, in order that the employee may e full benefit of the compensation payments, that any ient or release of claims for compensation shall be , and that such claims shall be exempt from levy of on and attachment, or other remedy for the recovery ction of a debt. The compensation is for the benefit injured or his dependents, so the laws usually specify e payments shall be made only to the injured or the ents.

question as to the extra-territorial application of the isation laws is one of the practical questions which sen in connection with the administration of the laws United States, for many of the laws have no pro- which relate specifically to this issue and so it is ry to determine when the issue arises in those states h there is no such provision in the law as to whether the law shall have any extra-territorial effect. With e boundary lines virtually effaced and employees hired

in one state sent into other states to work the question is as to whether accidental injuries which may occur in states other than the state where they were employed are covered under the law of the state where the accident happened or the law of the state where the contract of employment was made. Some of the laws specifically provide that they shall apply only to accidental injuries which may be sustained in the state in which the law was enacted, but most of the laws are silent on this subject.

This situation arises frequently in cases where the employment in the foreign state is of a temporary nature, for in cases where a foreign employer is doing permanent work in a state he usually complies with the compensation law of that state, but in the case of salesmen or any other employees going from state to state it is often impractical, if not impossible, to comply with the compensation law of each state in which the employer may operate. The law cannot at present be regarded as settled on this question of the extra-territorial effect of the compensation acts, but two factors have cooperated to accomplish a practical solution of the issue and obviate the necessity for judicial decision in many cases. In the first place, the tendency is, as between employer and employee, to regard the contract of employment as subject to the compensation law of the state in which the contract was made, regardless of the place where an accident may occur, and if an injured employee accepts compensation under the law of the state where his contract of employment was made he automatically waives any other rights against his employer. The second factor is the attitude of the insurance company which assumes the compensation obligation of the employer, for if the insurer receives the proper premium on the pay of the injured it is immaterial as an insurance proposition where the accident may happen, so it would pay com-

pensation under the law of the state where the contract of employment was made for accidents which occur in the course of employment regardless of the fact that the accidents happened in another jurisdiction.

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The compensation movement in several of the States has had a distinctive history, which appears in the different reports that have been made, the laws that have been passed, the decisions that have been rendered both regarding the constitutionality and the operation of the laws, and the official and the unofficial comments that have been made concerning the laws. A number of these references have been cited in this and the two preceding chapters, but in order that some of the most significant of them may be arranged under the heading of the different States a few

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CHAPTER VIII

THE INSURANCE OF THE COMPENSATION OBLIGATION

One of the serious defects of the common law system of employers' liability was the fact that there was no security provided by the system for the payment of any damages which an injured employee might be entitled to recover. A plaintiff might recover a judgment at the end of a long period of litigation only to find the defendant without any property with which to satisfy the judgment, and so his efforts were wasted. If an attachment of property sufficient to protect the judgment had been made at any stage of the proceedings the plaintiff was safe, or if in the absence of any such attachment the defendant had property of sufficient value which could be reached by an attachment at the termination of the proceedings the plaintiff was also safe, but if no attachment had been made and the defendant was unable to satisfy the judgment the plaintiff lost the benefit of his recovery.

It is, therefore, an essential element of a system which recognises the right of an injured to recover indemnity for all industrial accidents, if that system is to accomplish its purpose, that the payment of the required indemnity shall be secured so that the element of uncertainty as to the recovery of indemnity shall be reduced to a minimum. This security of payment is best effected by insurance of some sort, so in order to be complete the compensation system must in the first place provide for the insurance of the obligations imposed by the compensation law and then see that the in-

surance requirements are observed. Any compensation law which does not require insurance and then see that its insurance provisions are carried into effect is to that extent defective.

As to their insurance provisions the compensation laws which have been passed in the United States may be divided into three general classes: First; those which establish a state-administered system of mutual insurance to the exclusion, or virtual exclusion, of all other forms of insurance, and require all employers subject to the law to insure in the state fund. This is the form of security which is designated in our compensation system as "state insurance." Second; those which require that the payment of compensation shall be secured in some way, but leave the method of security to the option of the employer. The choice is usually between insurance in a state fund, in privately managed mutual associations, in stock companies, and the privilege of carrying one's own insurance subject to the approval of specified administrative authorities. All of these options are not open to the employer in the states which require insurance, for in some of those states no state fund is established, so in those states the choice is between mutual associations, stock companies, and self insurance. Third; those states in which there is no compulsion to insure, but the matter of insurance is left wholly optional with the employer.

Only a few of the states are committed to the policy of a state-managed insurance fund to the exclusion of all other forms of insurance, and only a few more leave it wholly optional with the employer as to whether to carry insurance or not, so the prevailing policy of our compensation system at the present time as to its insurance features is that of a compulsion to insure with a choice of the method of insurance. The only innovation which the system introduced in the

existing insurance institutions was the establishment of the state funds, for mutual associations and stock companies were already in existence for the purpose of protecting the legal liability of the employer, and as prior to compensation the matter of the insurance of his liability was wholly optional with the employer as far as any element of legal compulsion was concerned, he was at liberty to assume his own risk if he cared to do so. The insurance requirements of the compensation laws, however, introduced an innovation in the principle of the insurance of this obligation in two essential particulars. In the first place the employer was required to protect the liability imposed upon him by the compensation system by insurance or security of some sort, and in the next place the insurance or security was directly for the benefit of the injured employees rather than for the indemnification of the employer for any loss that he might sustain by reason of the liability imposed on him by law, as was the case with the employer's liability insurance contract under the common law system.

It was noted in the preceding chapter that as far as any foreign precedents are concerned the insurance and the administrative features of our compensation laws may be considered as an adaptation from the German system, but this resemblance is remote rather than direct and is more in principle than in practice or detail. Most of the nations which had adopted the compensation principle prior to its adoption in the United States had provided for some system of insurance, but the English law and the laws of the English colonies which had followed that law as a precedent had not made insurance compulsory but had left that matter optional with the employer, so that the systems adopted in the English-speaking countries prior to the enactment of the laws in the United States had been defective in principle in this

particular. It remained, therefore, for the United States to remedy this defect.

The practice on the part of employers of protecting their liability under the common law system by employers' liability insurance was prevalent before the adoption of the compensation system, and as an underwriting practice it may seem as if the insurance of the compensation obligation is only the logical underwriting successor of the practice of protecting the common law obligation by insurance, but the difference between the basis of the contract written to protect the common law liability and that written to cover the compensation obligation is so radical that this difference should be thoroughly understood before considering any of the principles of compensation underwriting.

The practice of employers' liability insurance had its inception in England shortly after the passage of the Employers' Liability Act in 1880, and it was introduced in the United States within a few years after its inception. As the changing legal and social conditions increased the liability of the employer to his employees for occupational injuries the protection of that liability by insurance of this nature became prevalent, and almost universal in many parts of the United States and in many different lines of employment. When the compensation laws were passed the different companies which had been writing employers' liability insurance were in a position to assume the liability imposed on employers by the adoption of this system, in those states in which insurance was required but the choice of institutions was left with the employer and in those in which the matter of insurance was wholly optional with the employer. This form of insurance was barred to the private companies in those states which adopted the principle of a state-managed fund to the exclusion of all other methods.

The contract which was written to protect the obligation imposed on the employer by the common law system of employers' liability, or "employers' liability" insurance as distinguished from "compensation" insurance, was a contract which was made between the employer and the insurer solely for the benefit of the employer, and all of these contracts were subject to certain conditions and limitations which were eliminated in the underwriting of the compensation obligation. It has already been noted that the compensation system introduced an innovation in the insurance principle in two essential particulars, and these particulars must be emphasised in the consideration of the subject of the insurance of the obligation imposed on employers by that system.

The element of compulsion to insure was a radical innovation, for while hitherto the legal and social conditions had made it advisable for employers in many sections of the United States to protect their liability by insurance, still it was entirely optional with each individual employer, as far as any element of legal compulsion was concerned, as to whether or not he should carry employer's liability insurance. With the introduction of the compensation system, however, and with the liability of the employer to pay compensation absolutely fixed if he became subject to the operation of the system, either by compulsion or by voluntary action, it became one of the fundamental principles of that system that the payment of the obligation which it imposed should be guaranteed by security of some sort, and the only way in which this object could be effected was by adopting the principle of compulsory insurance, so such provisions were inserted in the laws and we have the element of compulsion to insure in the compensation system in place of the option to insure in the common law system.

The other essential particular in which compensation in-

surance differs from employers' liability insurance is that the employers' liability policy was written primarily for the protection of the employer while the compensation policy is written primarily for the protection of the employee. Under the employers' liability policy the injured employee had no rights against the insurer. The theory of this form of underwriting was that the insurer reimbursed the insured after the payment of a judgment for any loss which he might have sustained by reason of his legal liability to an injured employee. Under this theory no loss had been sustained unless a judgment had actually been satisfied by the employer, so it was inconsistent with the idea that a successful plaintiff could proceed directly against the insurer for the recovery of his judgment, and the employers' liability policy, in theory at least, afforded him no security for the payment of his judgment.

The result of the operation of this theory was that if an employer was unable to satisfy a judgment which an employee had obtained against him the employee had no recourse against the insurer and the effect of the recovery of the judgment was lost. The courts held when this question was presented to them that the employers' liability policy was a contract of indemnity between the employer and the insurer, that the employee was not a party to it, and that, therefore, he had no rights against the insurer for the recovery of a judgment. A contract of this nature might have nullified the purpose of the compensation laws, so in the provisions regarding the insurance of the obligation which were inserted in those laws it was specified that the insurance was for the benefit of the injured employees who were entitled to compensation, that the insurer must assume all of the obligations placed on the employer by the compensation laws, and that an employee might proceed directly against the insurer for

he recovery of compensation if this course was necessary.[1]

The provisions of the employers' liability contract were vholly a matter of agreement between the insurer and the nsured. It was in the first place optional with an employer ıs to whether he should carry this form of insurance or not, ınd if he chose to protect his legal liability the provisions)f the contract were the subject of agreement between him

1 While the courts in some of the states have on various grounds held :hat a successful plaintiff could proceed directly against an insurance :ompany, the better authority has sustained the position of the liability :ompanies in this matter. In the case of *Frye v. Bath Gas & Electric Co.*, 97 Maine 241, 54 Atl. 395, the complainant sought by a bill in equity to force an insurance company to pay a judgment that he had secured against the Bath Gas & Electric Co., that concern being in the hands of assignees who had made no effort either to pay the judgment or to compel the insurance company to pay it. The bill was dismissed, the court sustaining the contention of the insurance company that there was no privity of contract between it and the plaintiff in this action and in the negligence suit. See also *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981, where a similar state of facts was involved and a similar conclusion reached, and *Allen v. Ætna Life Insurance Co.*, 145 Fed. 881, in which the Circuit Court of Appeals held that an insurance company could not be garnisheed by the plaintiff in a personal injury suit. That the insurance money even in the hands of the insured cannot be charged with any trust for the payment of the judgment is shown in the case of *Bain v. Atkins*, 181 Mass. 240, 63 N. E. 414. In this case a question of coverage had been raised and the insurance company had taken a policy release from the insured for a substantial consideration. The insured used this money in his business, and was then unable to satisfy the judgment obtained against him. It was held, to use the language of the court, that "the only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest, any more than in any other property belonging absolutely to Atkins."

In view of these decisions some states have passed statutes that make an insurance company which issues a contract protecting the liability of an insured absolutely liable when a judgment has been secured, and allow a judgment creditor to proceed directly against the insurer if he is unable to collect the judgment from the defendant. For an example of a statute of this nature see the *Massachusetts statute, Chapter 464, Acts of 1914.*

and his insurer. The supervision which the state exercised over the agreement was only to the extent of seeing that each party to the contract fulfilled his agreement, and it was no concern of the state if the contract contained provisions which limited the liability of the insurer to a certain definite sum, or provisions which exempted the insurer from any responsibility under the contract if certain conditions were shown. The principal concern which the state had in the matter was as to the solvency of the insurance company and its financial ability to carry out any contract which it might make.

With the adoption of the compensation system the attitude of the state towards this form of insurance was changed. The obligations imposed by the system must be fulfilled, so insurance or security was made compulsory, and the insurance must be for the benefit of those entitled to indemnity under the law. The state, therefore, assumed sufficient control over the form and substance of the contracts which are issued to secure the compensation obligations to see that the objects of the system are accomplished, and so the laws usually specify certain provisions which must be incorporated in all insurance contracts that are made to assume this obligation. In order that the contracts may be in conformity with the requirements of the law it is usual to provide that any policy form which is to be written in a given state must have the approval of some state official before it can be issued to a compensation policyholder.

For the purpose of illustration it may be well to outline the insurance provisions of some one of the compensation laws, and the New York act is the one which will be used for that purpose.[1] This law requires that the employer shall

[1] The Compensation Law of New York is Chapter 67 of the Consolidated Laws. The insurance requirements are found in Article III, Sections 50–54.

ecure compensation to his employee either by insuring and keeping insured in the state fund; or by insuring and keeping insured in some stock corporation or mutual association authorised to transact the business of workmen's compensation insurance in the state; or on satisfactory proof to the State Industrial Commission of his financial ability to pay such compensation himself the commission may allow him to assume this obligation. The commission may, in its discretion, require an employer who has received permission to carry his own insurance to deposit securities to secure his liability, and it may at any time for good cause revoke this permission. Those states which have established a state fund usually specify the requirements concerning the care and management of the fund with considerable detail. These requirements concerning the New York Fund are found in Article V, Sections 90–106.

Failure to comply with the insurance requirements of the act subjects an employer to two specific penalties. In the first place he is liable to the state fund for an amount equal to the pro rata premium which would have been payable for the period of non-compliance, but the commission may in its discretion remit this penalty. In the next place an injured employee of such an employer, or the dependents or legal representatives of a deceased employee in fatal cases, may elect to proceed against the employer for compensation as provided in the act or for damages at common law, and if the latter procedure is chosen the employer is barred from the defence of contributory negligence, the fellow-servant rule, and that of assumption of risk, so that his liability is practically absolute, and the only remaining element in the case is that of the assessment of damages.

Inasmuch as it is one of the principles of compensation that industry shall bear the expense of industrial accidents

as one of the elements of the cost of production, it is inconsistent with that principle that any part of the cost of this system should be placed on the employee, so it is usually provided in the laws that any agreement on the part of an employee to bear any portion of the premium paid for compensation insurance shall be void, and some penalty is usually imposed on an employer who makes any such agreement with his employees, or makes any deduction from their wages for this purpose. Agreements of this nature are forbidden by the New York law.

The employer who has secured the payment of compensation in the manner required by the law must post and maintain notices to that effect, in form prescribed by the commission, in conspicuous positions in and about his place of business. An employer who has insured in the state fund in New York is then relieved from liability for injuries to employees which come within the provisions of the law, and the employee has no recourse against the employer but against the fund. An employer is not otherwise relieved from liability for compensation except by payment of the compensation himself or by his insurance carrier.

The policy must contain a provision which allows the commission to enforce any rights against the insurance carrier for the benefit of the person entitled to compensation. It must also contain a provision which makes notice of the injury on the part of the employer notice on the part of the insurer. This is in contrast with the provision in the employer's liability policy which required immediate notice to the insurer of any accident which may happen, and by virtue of which the insurer has the right to exemption from responsibility under the policy if notice is not given as required. The insurance carrier is made subject to any orders which may be made against the employer for the payment of

compensation, and the policy must contain a provision that the insolvency or bankruptcy of the employer shall not relieve the insurance carrier from liability under the policy.

The New York act does not require in so many words that the insurer shall assume all of the liability of the employer under the compensation law. Many of the laws contain specific requirements that an insurer must assume the entire compensation obligation, and while the New York law is not thus specific it is specific enough so that no limitation in the obligation is permitted. This principle of a limitation of liability was universal in the employer's liability contract, the standard limits of financial responsibility for the payment of judgments being five thousand dollars for an accident involving injuries to one person only and ten thousand dollars for an accident involving injuries to more than one person. These limits are often varied, and they might be much larger in some policies, but this principle of limitation of liability was one of the fundamental principles in the underwriting of the employer's liability contract.[1]

The result of this practice was that when a catastrophe happened and a large number of employees were injured the limit under the employer's liability policy was usually insufficient to protect the employer for the damages which he

[1] The question of the validity of this limitation in the employer's liability policy has been before the courts a number of times, and the courts have uniformly held with the insurance companies and in favour of the limitation. The contention has been that when an insurer elects to contest a suit rather than settle within the policy limit it waives its right to take advantage of the limit after a judgment in excess of the limit has been sustained, but this contention on the part of policyholders has been overruled. *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 92 Maine 574, 43 Atl. 503; *Munro v. Maryland Casualty Co.*, 96 N. Y. Supp. 705; *Maryland Casualty Co. v. Omaha Electric Light & Power Co.*, 157 Fed. 514; *Schmidt v. The Travelers Insurance Co.*, 244 Pa. 286, 90 Atl. 653, 52 L. R. A. (N. S.) 126.

might be obliged to pay, and so if he was unable to stand the excess over the limit of his insurance the injured employees, or their dependents or personal representatives, had no redress. In order that such a situation might not arise under compensation the laws have provided against any limitation of liability, so the insurer must assume the entire liability imposed on an employer by the compensation law, and in case of a catastrophe liquidate all of the claims which arise under the compensation law.

The nature and extent of the liability which the insurer is obliged to assume under the compensation system make it imperative that any institutions which are permitted to assume this obligation must be well fitted to discharge the requirements of the compensation laws and financially able to liquidate all of their obligations. Their liability is unlimited, and as catastrophes may occur in connection with industrial operations that result in injuries to or the death of hundreds of employees an insurer may be called upon at any time to put aside in its reserves large amounts to hold against the payment of claims on account of such calamities, and the obligation to make these payments may extend over a considerable period of time, for some of the laws require payments without any limit as to time in cases of permanent disability and to the dependents during the continuance of disability in fatal cases, so the insurer who underwrites the compensation obligation must not only possess financial stability but the prospect of existence long enough to discharge the obligations assumed. The employer is not necessarily discharged from his obligations under the compensation law by insuring as required, for if for any reason the insurer is unable to meet the obligations the employer is, as a general rule, liable for them, but the discharge of the obligations by the insurer automatically releases the employer from any

further responsibility. It is, therefore, a matter of great importance to all parties interested that the insurer be able to perform all of the obligations which it assumes.

It is important that the right of cancellation of a compensation policy shall be properly regulated. It is customary to insert in practically all insurance policies, with the exception of the life policy, an option which allows the insurer to cancel the insurance, and in the absence of any statutory requirements the provisions regarding cancellation are subject to the agreement of the parties. Cancellation cannot, of course, relieve the insurer of any liabilities which may have accrued under the contract up to the time of cancellation, but this procedure will relieve the insurer from any further responsibility after the date when cancellation becomes effective. It is usual for the compensation laws to specify the provisions respecting cancellation which must be inserted in the compensation policy, so that an employer will not be deprived of his insurance by any sudden or arbitrary action on the part of the insurer, for when the insurance company desires to cancel a compensation policy it should be compelled to give due notice to the employer in order that he may have an opportunity to place his insurance in some other company before the cancellation is effective. The New York law provides that an insurance carrier desiring to cancel a compensation contract must file at least a ten days' notice with the commission, and serve the same notice on the employer. The right of a private company to cancel is not restricted, but insurance in the state fund can be cancelled only for nonpayment of premiums.

Much of the agitation in the United States regarding the adoption of the compensation system has centred around the form of insurance which should be permitted to secure the obligation. The fact that insurance of some sort is necessary

in order that the operation of the system may be successful was generally admitted, and there was much discussion when the laws were under discussion as to the manner in which it might be permissible to obtain the required insurance. Inasmuch as the system imposed additional financial burdens of a compulsory nature on the employer the object was to make those burdens as light as possible by keeping the insurance premiums down to a minimum, but while the premiums must be kept as low as possible the insurance institutions must possess both financial stability and permanence in order to discharge the obligations which they assumed, so this factor of the insurance of the obligation has been one of the principal subjects of contention in the compensation movement in this country. The issue, in brief, has been as to whether the private companies, either stock or mutual, should be permitted to write this form of insurance, or whether the insurance should be written in a state-managed fund to the exclusion of all other institutions.

When the requirements regarding the insurance of the compensation obligation began to be considered in this country much opposition developed in some of the states to the permission of this form of insurance by stock companies. The companies which had been writing employers' liability insurance for those employers who chose to insure were in a position to assume the obligations which were imposed on employers by the compensation system, but such opposition developed to their being permitted to do so that in some states funds were established under the management of the state which assumed the exclusive control of compensation insurance and in other states such funds were established to compete for this business with private companies. The reasons for the opposition to compensation insurance by stock companies may be reduced to two general specifications: First;

the alleged excessive profits of the private companies which had been writing employers' liability insurance. Second; the alleged practices of the companies in the adjustment of claims which were made under those policies. The first specification is predicated upon a misinterpretation or a partial interpretation of liability statistics; the second upon a misunderstanding of the purpose of the contract which assumed the common law obligations of the employer as between employer and insurer.

The allegation as to the excessive profits of the companies writing employers' liability insurance, from that class of business, is based upon the assumption that a large part of the proportion of the premiums over and above the proportion paid out to claimants was clear profit. This assumption was usually based on the theory that the loss ratio was much less than that actually sustained, and the only answer to the allegation is that it was not so. It is possible that in the early days of liability underwriting some of the companies may have made some money from their employers' liability business, but as the volume of employers' liability litigation increased, as laws were passed which increased the liability of the employer, as the courts became more favourable to plaintiffs, as verdicts became larger and larger, and as the claims of injured employees increased both in number and amount, the different elements of uncertainty involved made it exceedingly difficult for a company to determine definitely at any given time whether it was making any money from its employers' liability business or not, and the general impression of the managers of these companies was that they were fortunate if the combined losses and expenses of the business did not consume all of the premium income.[1]

[1] It was hard to fix any definite and reliable loss ratio for employers' liability insurance because of the indefiniteness of the liability which

The criticism which was directed against the liability companies because of their alleged practices in the adjustment of claims under employers' liability policies was based largely upon a misconception of the purpose of this form of insurance, for many who did not understand the object of the contract assumed that it provided accident insurance for each and every employee who might be injured in the course of employment rather than protection for the employer as to his legal liability for claims made against him by injured employees. The result of this misunderstanding was that when a liability company refused to settle with a claimant because of the fact that his claim presented no merit from the standpoint of legal liability, it was assumed by those who did not understand the purpose of the insurance that the company was attempting to evade its obligations. It might also be assumed that a company was not discharging its obligations when it failed to settle claims in which the liability is doubtful, or claims in which the liability is clear, but the answer to this assumption is that the insurance company under its contract is placed in the same position as the employer and it has the same right that the employer has either to recognise liability and settle or to deny liability and con-

the contract was written to protect. For illustrative purposes it may be said that the business was usually written on the basis of an assumed loss ratio for claim payments of forty-five per cent and an expense ratio of fifty-five per cent, so that if either ratio exceeded the assumption and the other remained at the assumption the business was conducted at a loss. It might be possible to regulate the expense ratio at times, but regulation of the loss ratio was practically impossible because it depended on factors beyond the control of the insurance company, for the insurer had little or no control over legal conditions in a given community. The approximate division of the expense ratio of fifty-five per cent was twenty-five per cent for agents' commissions, fifteen per cent for home office expense, and fifteen per cent for adjustment and legal expense. These ratios and the sub-divisions of the expense ratio are only approximate, but they are sufficient for purposes of illustration.

test. The demands which were made upon insurance companies in liability cases were usually so large that an employer would never have settled for the amounts demanded and so insurers have exercised the same options that employers would have exercised. The indefiniteness of the liability which the common law imposed on the employer has made the matter of the settlement of employers' liability claims a subject of much speculation and negotiation, so the companies have had to submit to the conditions which they found regardless of the criticism which they might encounter.

The fundamental problem in compensation insurance is to classify the different occupations so that those with similar hazards shall be classed together and each class shall bear its own losses and not be compelled to contribute to the losses of more hazardous classes, and then to fix the premium for each classification at a rate which is sufficient to care for all of the losses of that classification. The obligations which may arise under a compensation policy are likely to extend over a considerable period of time, so the premium rate on any classification for a given policy period must in theory be sufficient to liquidate all of the obligations which accrue during that period. This necessitates the holding of considerable sums in reserve against the payments which are deferred. It is necessary, therefore, that the premium shall be sufficient to cover all of the payments which may have to be made during the policy period and the reserves which have to be carried to meet the deferred obligations as they become due.

In an endeavour to make compensation rates fair and equitable to both employer and insurer, and to keep them as low as possible, a provision has been inserted in the laws in some of the states requiring supervision of the rates by

some state official. This provision is usually to the effect that the official named shall approve any rates as to sufficiency, and that no rates can be promulgated by an insurer until those rates have been approved as required by law, This authority is given in general terms and requires approval as to sufficiency only, but the specification is broad enough to vest large discretion in the designated official. The power is one of the innovations which the compensation system has introduced, for prior to the introduction of this system the concern which the state had exercised over the solvency of an insurance company did not extend officially to the determination of rates but only to the determination as to whether or not the reserves maintained were sufficient to meet outstanding and deferred obligations.

The designation of the different forms of insurance for the compensation obligation given earlier in this chapter is that given in the laws. The division of the insurance institutions into state funds, stock companies, and mutual associations is somewhat inaccurate from the standpoint of the principle involved, so before giving any consideration to the arguments for or against any particular form of insurance this inaccuracy will be corrected. The division of institutions should be into stock companies and mutual associations, with a further division of mutual associations into two classes, the distinction between the classes being on the basis of the management, as to whether the association is managed by the state or by the members who compose it. Those managed by the state are the state funds, and those managed by the members are the mutual associations which are specified in the laws. Insurance in a state fund, or "state insurance" as the term is used in compensation insurance, is essentially insurance on the mutual plan, and so the state funds should be classified with the mutual institutions.

It is as yet too early to pass anything like definite or final judgment upon the best method of compensation insurance, for the compensation system has been in operation for such a short time that it is still in a formative state so none of its different elements have approached finality. The system itself seems established, and inasmuch as the insurance of the obligation is regarded as one of the essential elements of the system compensation insurance in one form or another is an established institution. Compulsion to insure is deemed necessary in order that the system may be effective in operation, and inasmuch as insurance is compulsory in any complete system the cost of insurance should be made as low as is consistent with soundness and solidarity in the institution which assumes this obligation. The issue, therefore, between insurance by stock companies and insurance on the mutual plan, either by a state fund or by a privately managed association, is as to which form can best serve the system, taking into consideration all of the necessary elements of compensation insurance.

The fundamental difference between insurance conducted by stock companies and that conducted by mutual associations is that a stock company does business for the benefit of its stockholders and any profits which may arise from the business belong to them, while in a mutual association the policyholders themselves constitute the association and the profits belong to them. A stock company, therefore, would assume a risk for a definite premium, and if the premiums are insufficient to pay the losses and expenses, the deficit must come from the surplus funds of the company. In a mutual association the members are liable to assessment for the purpose of meeting the losses if the original premiums are not sufficient. The premium which a policyholder pays to a stock company is all that he is called upon to pay for his pro-

tection, while if he is a member of a mutual association he is liable to assessment if the premiums collected in the beginning are insufficient to liquidate the liabilities of the association.

The loss ratio in compensation insurance is theoretically the same in stock companies and mutual associations, and there are certain elements of expense of management and administration which must in theory be the same. Stock companies, however, must have agents to solicit the business and the agents must be paid, usually by a percentage of the premium, so in theory the state funds, which employ no agents, and private mutual associations which consist of employers who have voluntarily associated themselves together for the purpose of insuring their compensation obligations, are free from this element of expense, and can, therefore, conduct the business on a cheaper basis than the stock companies. In addition to this elimination of the element of agents' commissions the fact that any profits which may accrue from the conduct of the business by state funds or mutual associations which are privately managed belong to the policyholders and are returned to them may appear to make the theoretical advantage in favour of the conduct of the business on that basis.

In view of this apparent theoretical advantage for insurance on the mutual plan the advocates of insurance by stock companies must show that the practical advantages are with the stock companies if they wish to succeed in competition with the mutual associations. Insurance is a technical business, and those who conduct it must have special training for their duties and responsibilities. The element of politics is too often present in the conduct of any business undertaken by the state, and this element is likely to be a factor in the management of state funds, so it is questionable whether men

can be obtained for and retained with the state funds who are fitted for their management. The credit of the state is not behind the state funds, so the policyholders are liable for assessments for any deficits that may arise, and the same is true of privately managed mutual associations. The stock companies, on the other hand, must carry the risk for the rate originally charged and make up any deficits from their surplus funds, so that the employer who has insured his compensation obligations in a stock company is not liable for any assessments.

As a practical proposition a privately managed mutual association does not possess the same stability as a stock company, so such an association may suffer in management as compared with the management of a stock company. While a state fund may eliminate the element of agents' commissions either by monopolistic control of compensation insurance or by offering that insurance in competition with other institutions to any who may apply for it, a privately managed mutual association does not as a rule have this advantage in competition with stock companies, for in order to get business it must have an agency organisation or its substitute, so this element of expense is present both in the stock companies and in the privately managed mutual associations.

In summing up the issue as to whether stock insurance or mutual insurance is preferable for the insurance of the compensation obligation, in a very few words and free from all theoretical considerations, it may be said that the practical situation which presents itself is a choice between a contract which for a definite rate assumes all of the obligations of an employer for a given policy period, and membership in an association which promises some return to him if the premiums collected are in excess of the amount required to meet losses and expenses, but which, on the other hand, makes

him liable to unlimited assessments as a partner in the enterprise if the premiums are insufficient to meet the obligations assumed.

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CHAPTER IX

THE ADMINISTRATION OF COMPENSATION LAWS

By placing a liability on the employer to compensate an employee for injuries which he might receive in the course of his employment and arising out of it, except those caused by his wilful or intentional negligence, as a substitute for the common law liability based on the idea of legal fault on the part of the employer, the compensation system eliminated the element of uncertainty as to the basis of liability which was one of the defects of the common law system; by prescribing a definite schedule of indemnity to be paid to injured employees or their dependents the compensation system eliminated the element of uncertainty as to the amount of recovery which was another defect of the common law system; and by requiring that the payment of the obligations imposed by the compensation system should be secured by insurance of some sort that system eliminated the element of uncertainty as to the collection of any judgment that might be recovered which was also a defect in the common law system.

Another defect in the common law system which the compensation system must eliminate in order to make its operation effective was that of the litigation which was necessary in order to enforce common law rights by legal process. The element of delay which is an incident of litigation, together with the element of uncertainty as to the outcome of the litigation, made it difficult for an injured employee to enforce his

rights unless he was financially able to stand the delay. Unless the compensation system had adopted some method of eliminating the litigation which was an incident of the common law system it would have been fundamentally defective from a practical standpoint, and in realisation of this fact those who drafted the compensation laws in the larger number of the states in the United States provided a special form of administration for those laws, and that administration in each state in which the law makes such a provision is one of the established branches in the conduct of the affairs of the states.

Some of the states, however, have provided no special form of administration for their compensation laws but leave the matter of administration to the courts. It should be said in justice to those states that their laws usually provide that all compensation suits which are submitted to the courts shall be decided summarily and with as little delay as possible, and free from legal technicalities, so in those states the effort has been made to eliminate the element of delay in legal procedure which was one of the defects of the common law system. Inasmuch as the states which leave the administration of their compensation laws to the courts are in a minority the system of compensation administration to which this country is committed is that of administration by a special administrative body.

As far as the system of special administration for compensation laws which has been adopted in the United States can be traced to any foreign precedent it may be stated generally that it is an adaptation of the German system, for the German laws provide a special administrative system for their compulsory social insurance system, but the resemblance between the German administration and the administration in the United States is remote rather than direct. Our compensa-

tion administration may be considered as an adaptation to the compensation system of a form of administration which had been applied to other laws, and speaking from a practical standpoint it should be said that it was adopted from apparent necessity rather than from reliance on any foreign precedent.

The principle upon which the practice of taking the administration of certain classes of laws out of the hands of the general executive authorities is based is that those laws require more detailed attention than can be given to them by the authorities entrusted with the general administration of law, and also that these laws require for their proper administration certain technical qualifications which are not as a general rule possessed by the general executive authorities. It is advisable, therefore, in order that certain laws be summarily and efficiently administered, particularly as to their details and as to preliminary matters in which some decision as to their meaning is necessary, that special administrative bodies be entrusted with their execution.

This form of administration is particularly desirable in cases where individuals are dealing with corporations whose business is in the nature of a public service, for in such cases it is often necessary that the rights and duties of those corporations be determined in a summary manner in order that the interests of the public may not suffer, and that an individual may have his rights against such a corporation determined without the necessity of an appeal to the courts. The theory of this form of administration is not that the jurisdiction of the courts is ousted, for recourse to the courts must be permitted in all cases where decisions are necessary as to the meaning and application of any law, but the theory is that in many matters which are in dispute, particularly questions of fact in which no very important issues of law are

involved and questions where the meaning of the law may be in dispute but the decision of any tribunal possessing jurisdiction over the matter will be satisfactory to all parties, there should be some intermediate authority between the courts and the parties who are in interest to pass upon such disputes, for in many cases the rulings of such an authority will be accepted as final and the necessity of litigation in the courts obviated. The jurisdiction of these tribunals may also be of a supervisory nature, in order that certain laws may be executed as required without the necessity of appeal from parties who may be interested in their execution.

Administration of this nature has been provided for various classes of laws in the United States, both by the federal and the state governments. Some of the most familiar instances are those which relate to the administration of railroad laws by the different commissions, to the supervision of insurance, and to the supervision of banking. It was seen that this form of administration was particularly well fitted for the administration of compensation laws, and so it was applied to those laws in the greater number of the states. It will be assumed, therefore, that this is the proper form of administration for compensation laws, and this chapter will be devoted to a brief consideration of the administration of the laws in this manner.

This administration is usually entrusted to a body consisting of three or five members, but it might be left with a single official. The administrative body is always designated by some distinctive name, such as "The Industrial Accident Board," "The Industrial Accident Commission," "The Workmen's Compensation Commission," or some similar name. For purposes of convenience this body will be referred to in this chapter as the "commission." The function of this commission is to see that the compensation laws are administered

properly and that their purposes are carried into execution. The major factor in administration is to see that the right of an injured to receive compensation is determined with as little delay as possible, and if his right to receive it is established that it is paid as directed by the employer or his insurer. There are, however, numerous minor factors of importance in the administration of the laws, such as receiving and filing notices of election or rejection, the supervision of the insurance of the obligation, and many other details to which the commission must give attention. In those states in which state funds have been established the management of the fund is usually vested in the commission. This chapter will deal only with the major factor of administration, that of the determination and adjustment of claims which arise under compensation laws.

The general principle of administration by a commission is that the commission shall pass upon all questions of dispute between employers and employees as to the application of the compensation law. These questions may involve either law or facts. If a question of law is involved either party may, as a rule, take an appeal to the courts to have the issue of law determined, for a final decision may be necessary on that question, but if the question is one of fact only the decision of the commission is usually final and no appeal is allowed. Thus the commission is vested with the functions of both judge and jury under the common law system, and in practice it passes upon the cases submitted with as little delay as possible so that the rights of the parties may be summarily determined. Compensation administration has, therefore, become one of the recognised administrative departments in those states which have adopted a special form of administration, and a considerable body of official literature on the subject is already in existence in this country in the

shape of reports of decisions of the commissions and of the courts, and the reports of the commissions upon the general administration of the laws.

In order to illustrate the organisation and functions of a body vested with the administration of a compensation law, as they are prescribed by statute, it may be well to outline the provisions of some one of the laws and for this purpose the New York law is the one chosen.[1] The administration of this law was vested in the "State Workmen's Compensation Commission," which consisted of five Commissioners appointed by the Governor, by and with the advice and consent of the Senate, for a period of five years, one of whom should be designated by the Governor as Chairman, and not more than three of whom should belong to the same political party. The Commissioner of Labor was *ex-officio* a member of the commission, but he did not have any vote on its orders, decisions or awards. Each appointive Commissioner must devote his whole time to the duties of the office.

The commission was authorised to appoint one or more Deputy Commissioners, a Secretary, and such other clerical,

[1] These provisions are found in Article IV, Sections 60–77, and in Article II, Sections 19–20, of the compensation law, and outline the provisions for the establishment of the "State Workmen's Compensation Commission" as originally passed. In 1915, by Chapter 674, Laws of 1915, effective May 22, 1915, some changes were made which affected the details of these provisions of the law but made no substantive changes. A bureau was added to the Labor Department to be known as the Workmen's Compensation Bureau, and all of the work of the department is to be supervised by a commission called the "State Industrial Commission." This commission was organised in practically the same way as the "State Workmen's Compensation Commission," and was vested with the functions of that commission as to the administration of the compensation law. This change in New York may be regarded as indicative of a tendency to combine the administration of the compensation laws with the functions of the labour departments in the different states, and have the administration of all laws relating to labour under one general department of the state government.

professional, or technical attachés as may be necessary in order to carry the duties of the commission into execution. The general duties of the Secretary were prescribed in the law, and also the general nature of the rules which the commission is authorised to make. The commission has power to subpœna witnesses and to order the production of books or papers. If a person fails, without reasonable cause, to respond to the subpœna of the commission he is guilty of a misdemeanor, and if he refuses, without reasonable cause, to be examined the commission may apply to the court for an order on such person to show cause why he should not be committed to jail. The commission is required to prepare and distribute the blank forms used in administration. The expenses of the commission are at present defrayed from the general funds of the state, but it is provided that after July 1, 1917, and annually thereafter, those expenses shall be apportioned among the different insurance-carriers in the state, including the state-fund.

Notice of all accidents which are covered by the compensation law must be given to the commission. If the disability extends beyond the waiting period the employer and employee are to agree regarding the payment of compensation, this agreement to be made on a form prescribed by the commission, and the agreement is to be filed with the commission. If the agreement is in compliance with the law the commission approves it and this approval constitutes an award. If the parties fail to agree regarding the payment of compensation it is necessary for the commission to settle the dispute. Any investigation or hearing which is necessary for the determination of the issue may be held before any Commissioner or Deputy Commissioner, and the award, decision, or order of the Commissioner or Deputy Commissioner when

approved by the commission is the act of the commission. The decision of the commission is final on questions of fact, but appeals may be taken on questions of law or the commission may certify questions of law to the court for decision.

The provisions of the New York law may be regarded as typical of the provisions which have been made for compensation administration in those states in which a special form of administration has been adopted. Variations in detail appear in the different laws, but the principle running through them is the same, in that it is usually required that accidents be reported to the commission, that the agreements be approved by them, that a single commissioner may conduct hearings, and that the decisions of the commission on questions of fact shall be final, appeals being allowed only on questions of law. This brief survey of the functions of the commission shows the superiority of administration in this manner over administration by the courts, for it can readily be seen that the courts with all of their other business cannot give sufficient attention to the details which are involved in compensation administration.

In a state in which the compensation law is of limited application the first question which may reach the commission in connection with a compensation claim is as to whether or not the occupation in which the injured was engaged at the time of the injury comes within the coverage of the law. Questions of this nature also arise in states where the laws are of general application, for all laws contain some exceptions and the commission is the first tribunal to determine as to the application of the law in a state in which it is of general application as well as in a state where it is of limited application. The commission is, therefore, often confronted with the issue as to whether or not the accident is

covered by the compensation law, but this issue is, from the nature of the case, raised more frequently under limited laws than it is under laws of general application.

If it is clear that the occupation is covered under the compensation law the next question that may arise is as to the nature of the occurrence from which the alleged injury arose which constitutes the basis of the claim. The laws relate particularly to personal injuries by accident arising out of and in the course of employment. The determination of this question may involve two features: First, was the occurrence from which the injuries arose an "accident" within the meaning of the compensation law? Second, if it was an accident did this accident occur in the course of employment and arise out of it?

It would be futile and it would serve no practical purpose to attempt any definition of the word "accident" as it is used in this connection. It is sufficient to accept the ordinary signification of the word as relating to some sudden, unexpected, and violent occurrence from which injury results. In the greater number of claims which arise under the compensation laws there is no question but what an accident has happened, and that the accident is responsible for the injury, but in some cases the issue arises as to whether or not an accident has actually occurred. The most frequent instances of cases of this nature are cases in which the disability appears to arise from causes which are commonly considered diseases rather than accidents. While the line of demarcation is very clear in most cases, and it is easy to say in some cases that the disability was caused by accident and in others that it was caused by disease, there are cases in which it is difficult to determine whether the disability is the result of a disease or of an accident, and when

his issue is raised it must be determined by the commission. The general principle is that the compensation laws cover disability caused by accidents, while they do not cover disability caused by disease.[1]

There may be no question but what an accident has happened and that disability has arisen from that accident, but there may be some question as to whether or not the accident happened in the course of employment and arose out of it so as to bring it within the scope of the compensation law, for the only sound principle of compensation is that it must be shown that an accident happened in the course

[1] Note the observations regarding the relation of occupational diseases to compensation in Chapter VII. Disability or death caused by disease which follows as an incident of the injury is covered for compensation. *Cantwell's case*, 2 Massachusetts Compensation Cases, 246, where an employee died from hypostatic pneumonia following an operation for a dislocated clavicle sustained by accident, and it was held that his widow was entitled to compensation. *Silva's case*, ibid., 597, where an employee died from septicæmia following an injury, and it was held that his mother and dependent was entitled to compensation. A few instances of cases where it has been held that no accident was responsible for the disability, and that, therefore, no compensation was payable, may be cited as illustrations of the principle, and as a matter of convenience these cases are taken from the same volume of the Massachusetts Compensation Reports. *Twoomey's case*, ibid, 540, where an employee was kicked by a horse and died within a few weeks, but it was shown that he died from a perforated ulcer of the stomach which had no relation to his injury. *Lynch's case*, ibid, 591, where an employee was injured in May and died in September from acute dilatation of the heart, which had no causal relation to the injury. *Schwartz' case*, ibid, 728, where an employee was injured by a fall and later developed bronchitis and intestinal tuberculosis, which it was shown was not caused by the injury. If these diseases could in any way have been traced to occupational hazards they would have been covered for compensation in Massachusetts, because of the rule in that state which holds that a disease arising from employment, independent of accidental origin, is a "personal injury" within the compensation law. This ruling is based on the wording of the Massachusetts law, and has not been adopted in other states.

of employment and arose out of it before compensation can be paid for the disability which it occasioned. There may in the first place be a question as to whether an accident happened in the course of the employment of the injured, and even if it is shown that the accident so happened there may be a further question as to whether the accident arose out of the employment or not. When these issues are raised they are for the commission to determine, and on principle compensation must be refused unless it is shown that the accident both happened in the course of the employment and arose out of it.[1]

[1] This principle that an accident must both occur during the course of employment and arise out of it is well illustrated in the case of *Hopkins v. Michigan Sugar Co.*, 1 Michigan Compensation Cases, 185, 184 Mich. 87, 150 N. W. 325. In that case the decedent, who was chief engineer for the defendant and had supervision of the installation of machinery in several different plants, received an injury while preparing to board a street car by slipping and falling on icy ground, and died as a result of that injury. He was in the employ of the defendant at that time, but it was held that his widow was not entitled to compensation because the accident which caused his death was not due to any of the hazards of his employment, and so did not arise out of it.

Questions often arise as to whether accidents that happen to employees going to or from work are covered for compensation, and the issue then is as to whether or not such accidents occur during the course of employment and arise out of it. The principle upon which this issue is determined is this: if the employer furnishes transportation as an incident of the employment these accidents come within the coverage of the law, but if the employer does not furnish the transportation but the employee is at liberty to select any method of getting to or from work he is not covered for compensation during that period. For instance, an employee was engaged as a carpenter and it was understood that he would be taken to and from work in an automobile hired by his employer. He was injured while being transported to the place of employment in this automobile, and it was held that the accident arose out of and in the course of employment. *Gilbert's case*, 1 Massachusetts Compensation Cases, 133. In *Newton's case*, 3 Massachusetts Compensation Cases, 491, a foreman for the Commonwealth engaged in supervising work on the highways was killed while riding home from work in a team belonging to one of the men he had hired. Transporta-

The compensation system does not intend to put a premium on gross or wilful negligence or serious misconduct on the part of the injured, or on intentionally inflicted injuries, so it is usual to except such coverage from the compensation laws. The determination of the issues which may arise under this exception is essentially a question of fact, so it is incumbent on the commission to pass upon such issues as they arise. If it is shown that a given case comes within the exception no compensation is payable and there is no recovery at common law, so the injured must bear the consequences.[1]

The actual parties in interest in compensation proceedings are usually the employee and the insurance company. Under the system of compensation insurance which has been adopted in the United States, as outlined in the preceding chapter, the insurer is obliged to carry all of the obligations of the employer when it assumes his risk, and so when claims for compensation are made they are referred to the in-

tion was no part of his contract of employment, so it was held that the accident did not arise out of the employment.

Employees may receive personal injuries during working hours, but under such circumstances that the injuries cannot be considered as having arisen out of their employment, and so they are not entitled to compensation for the disability arising from those injuries. Two employees were fooling and one received injuries. It was held that he was not entitled to compensation. *Geceiviec's case*, 3 Massachusetts Compensation Cases, 183. Injuries received by reason of a quarrel with a fellow-employee are not covered for compensation. *Oesting's case*, ibid, 385.

[1] A common instance of cases where it has been held that injuries were caused by the serious and wilful misconduct of the injured is that where injuries have been sustained while in a state of intoxication. Some states specifically except injuries sustained while in such a condition from the operation of the act, but regardless of any specific exception as to intoxication the rule is that when established it is a bar to compensation claims. *Kiley's case*, 3 Massachusetts Compensation Cases, 118; *Rochville's case*, ibid, 153.

surer by the employer and the insurer is then obliged to take the place of the employer in all of the proceedings and abide by any decision which may be rendered at the termination. In pursuance of its functions the insurance company has to receive all notices of accidents, investigate to ascertain whether or not they come within the compensation law, see that statutory medical aid is furnished as required, and then see that compensation is paid when it is due during the continuance of the period for which it is payable. The insurer as an incident of insurance service assumes the performance of all of these details of the compensation obligation, and relieves the employer of all of the other duties placed upon him by the law in those states in which the commission permits the assumption of those duties. This means that the insurer will, if permitted to do so, file all of the reports which an employer is required to file with the commission and act as his representative in all compensation matters.

The rights of the parties under the compensation law, particularly those of the injured employee, must be decided with as little delay as is consistent with full opportunities for investigation and determination. It is no particular hardship to the employer or to the insurer if the proceedings are delayed, but as this element of delay was one of the defects of the common law system it must be eliminated as far as possible in the compensation system, and so the laws provide for a summary determination for disputed issues under the compensation law. In addition to being summary the proceedings must also be free from legal technicalities, particularly those relating to the rules of evidence, for these rules often made it difficult for a plaintiff to establish his case at common law so those technicalities were removed by the compensation system. This means that in attempting

to establish rights under the compensation law any evidence which has any bearing on the case may be considered, regardless of the fact of its admissibility under the rules of the common law.

Unless the disability extends beyond the waiting period specified in the law no compensation is payable, but the provision requiring the employer to furnish medical and surgical treatment is applicable immediately upon the occurrence of an accident resulting in an injury. This obligation is known in compensation administration as "statutory medical aid," and as noted in Chapter VII the provisions regarding it vary in the different laws, in that in some the obligation is limited as to both time and amount, in others as to time, in others as to amount, while in some of the laws the obligation is unlimited as to both time and amount. It is the duty of the commission to see that this obligation is properly administered, and any disputes which may arise in the course of its administration must be settled by the commission.

One of the most troublesome of the factors which arise in the administration of this provision is that of the limitations placed on it in those states which have adopted the principle of a limitation, for in many cases, particularly those involving serious injuries or prolonged periods of disability, the limitations are entirely inadequate and incompatible with the idea of proper and suitable treatment, and the expense of subsequent treatment must be borne by the injured, by the employer, or by the insurer. In cases where the charges are in excess of the amount provided in the statute the commission usually pro rates the statutory limitation among the different creditors, who lose the excess unless it is paid by the injured or some one in his behalf. This is doubtless only a temporary situation, for as the laws are

amended the limitations will probably be extended or removed. One practical solution of the situation has been the attitude of the insurance companies, for in many instances they have assumed the cost of additional medical or surgical aid in the hope that the period of disability might be reduced by proper treatment, which otherwise the injured might not have secured.

Another factor in the administration of this provision is that of the authority given to the commission in some of the states to regulate the charges for these services. The aim is to keep this element of expense as low as is consistent with first class services, and to keep the scale of fees for such services on the same basis that it would be if the injured were paying the charges himself rather than the employer or his insurer. It is recognised that there might be a tendency on the part of some physicians and surgeons to render higher charges in cases where it was known that the employee himself was not obliged to pay than in cases where he was obliged to pay, and to counteract this tendency the power of regulating these charges is vested in the commission. The Connecticut law expresses the situation very well when it provides that the charges for medical, surgical, or hospital services "shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured persons," and it should be the object of the commissions generally to keep such charges down to this scale.

The fees of attorneys who may represent claimants in compensation proceedings are also made the subject of regulation by the commission in some of the states. The practice of attorneys of taking negligence cases on a contingent fee basis was one of the defects of the common law system,

or in cases where recovery was had a large share of the ecovery went to the attorney and the plaintiff received a omparatively small amount. It is the intention of the ompensation system to eliminate the element of legal ex- ense as much as possible, and ordinarily a claimant would ot need an attorney to represent him in proceedings before he commission, for those proceedings are free from any ormalities in the way of pleadings or of rules of evidence, o that the claimant may present his case to the commission n his own way and the commission may adopt any method it chooses to ascertain the facts. In some cases, however, it may be advisable that the claimant have an attorney to represent him, but in order that the attorney may not be permitted to bargain with the claimant for a considerable share of the recovery as is customary under the common law system, the commission is given the authority to regulate the charges of attorneys in these proceedings.

Disputes may arise as to the nature of the disability, as to whether it is total or partial, and as to whether or not the disability is at an end, and when the parties are unable to come to an agreement in such cases they must be submitted to the commission for determination. It is important that an injured shall not be permitted to prolong his disability, or malinger, and so in the interests of the employer or of the insurer the commission must often decide whether or not disability has terminated. The determination of this issue is essentially a question of fact and one in which medical evidence is a large factor, so this situation serves to emphasise the importance of the medical element in compensation.

Conflicting interests may appear in medical testimony, for it is natural that in doubtful cases the physician who is attending the injured will want to have his testimony as favourable as possible for his patient, while if the employer

or insurer has any physician in the case his testimony would naturally favour his client. This situation makes it imperative that in these proceedings physicians should be summoned into consultation who have no bias or prejudice towards either side, and so the testimony of the impartial physician is a factor of considerable importance in compensation administration. The law provides, for the protection of the employer, that the injured may be compelled to submit himself to examination by an impartial physician from time to time, in order that his condition may be ascertained, and authority is given to the commission to secure such medical assistance as may be necessary. Failure or refusal on the part of the injured to submit himself to examination as required by law is usually penalised by a suspension of compensation payments during the period of such failure or refusal.

Injuries may occur which would not of themselves result in total disability but which have this effect because of some pre-existing bodily defect, and the issue has been raised as to how the disability resulting from injuries of this nature should be treated under compensation. The disability is total, but should the employer be called upon to compensate for total disability when the reason for it is the pre-existing condition, which may have been caused by some previous injury, rather than the injury received in the course of employment? The general answer to this question is that the employer must take the employee as he finds him if he allows him to enter his employment, and the result is that the employer is held for the disability which arises from the accident regardless of the fact that some pre-existing defect may have contributed to cause a disability different from that which would have arisen if that defect had not existed.[1]

[1] This principle is illustrated by the decision of the Supreme Court

The question of dependency in fatal cases is one which is often submitted to the commission for determination. Certain relationships are usually named in the laws which when shown constitute total dependency without any proof of actual dependency, but in other situations the issue of dependency, either total or partial, is one of fact and must be determined by the commission. Total dependency is usually presumed on the part of a wife who is living with her husband at the time of his death, or on the part of a husband who was living with his wife, and on the part of minor children below a certain age, and the compensation which these dependents shall receive is specified. In other cases if total dependency is shown the dependents shall receive the same compensation as those for whom total dependency is presumed; if partial dependency is shown the compensation has to be determined according to the measure of the dependency. The determination of the compensation in cases of partial dependency must of necessity be somewhat arbitrary, for the circum-

of Massachusetts in *Branconnier's case*, 223 Mass. 273, 111 N. E. 792. In that case an employee who had lost one eye in 1910 met with an injury in 1915 which destroyed the vision of the remaining eye, and the Industrial Accident Board awarded compensation for total disability. Appeal was taken, for it was claimed that total disability could not be attributed wholly to this accident because of the previous loss of one eye, but this claim was overruled and it was held that the employee was entitled to compensation for total disability, because the employee entered the employment with an impaired capacity and when the capacity which he possessed was gone he was totally incapacitated and was entitled to the benefits provided in the compensation law for such cases. A different conclusion was reached by the Supreme Court of Michigan in the case of *Weaver v. Maxwell Motor Co.*, 186 Mich. 588, 152 N. W. 993, but the Michigan court reached its conclusion on the language of the Michigan statute, and the Massachusetts court observed that if that decision was inconsistent with their decision they were constrained not to follow it. On principle, it seems as if the Massachusetts decision will be accepted as the correct rule in compensation administration.

stances do not admit of determination on any very accurate or scientific basis.

The matter of commutation of the small periodical payments into a lump sum payment or several larger payments is one which is frequently submitted to the commission. The element of conservation, which is a large factor in compensation, demands that the indemnity be paid to the injured or to his dependents in small amounts and in frequent payments so that it can be used as needed, and this principle negatives the idea of allowing commutation of these payments but this is not a rigid and inelastic rule, so provisions are made in the laws by virtue of which lump sum settlements are permitted when good and sufficient reasons can be shown why they should be made. The theory on which compensation is based is averse to any such practice, so it should not be allowed to become general and all such requests should be thoroughly investigated and declined unless the reasons why they should be granted are controlling. The provisions for commutation in the laws are usually phrased in very general terms and vest large discretion in the commission regarding such petitions. In some of the states a petition for a lump sum settlement can be filed at any time, while in others the periodical payments must have continued for a certain length of time before a petition can be filed. The issues involved are primarily and almost wholly issues of fact, so there is little or no ground for appeal from the decision of the commission.[1]

[1] The provisions of the New York law regarding lump sum settlements are quoted as being typical of such provisions:

"The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee or, in case of death, his dependents, provided the same shall be in the interest of justice." Section 25.

The rule adopted by the Industrial Accident Board of Michigan gives a clear and concise summary of the situation, and is as follows:

It is the object of the method of compensation administration which has been adopted in this country, as noted earlier in this chapter, to obviate in the compensation system the defects which were inherent in the matter of enforcing claims under the common law system of employers' liability, and to accomplish this object the method of summary administration outlined in this chapter has been substituted for the procedure in the courts which was necessary under the common law system. The essential difference between the administration of the common law system and this form of compensation administration is that which distinguishes the

LUMP SUM PAYMENTS.

"It is manifest that the clear purpose of the legislature was to provide that the compensation receivable under this law should go to the persons or families entitled to the same in weekly payments, it being the judgment of the legislature that when so paid it would more effectually meet and relieve the wants of the injured employees and their families, than if paid in a lump sum. This view has the full endorsement and concurrence of the Board. Therefore lump sum payments will only be authorized in exceptional cases where circumstances create a necessity for such action. Application for lump sum payments can only be made after an 'Agreement in Regard to Compensation' has been filed with and approved by the Board, or an award of compensation made; and such application is required to be in the form of a sworn petition setting forth in detail the facts and circumstances on which the application is based. Desire of the applicant to go to another state or country, or to buy property, or to invest in business, etc., do not constitute reasons for lump sum payment. In general, conditions created by the acts of the injured employee or his dependents after the accident do not constitute ground for such payment. As a general rule, the circumstances and conditions that will justify such payment are those existing prior to the accident or created by it, such as mortgage indebtedness on the home of the employee. In such case both the indebtedness and attendant conditions must be set forth in detail, and if secured by mortgage, the location and description of the property must be given, the name and address of the mortgagee, and the office or place where the mortgage is filed."

Rule X, printed in Bulletin No. 3, Industrial Accident Board of Michigan, page 51.

For a discussion of some specific instances of requests for lump sum settlements, see "The Payment of Compensation by Lump Sums," 2d Annual Report, Industrial Accident Board of Massachusetts, pages 146–50.

deliberate procedure of the courts from that of a body specially entrusted with the summary administration of a particular statute, and this observation holds good as to those states where no commissions may have been established for the administration of the compensation laws, because those laws which provide no special machinery for their administration, but require the parties to resort to the courts, usually specify that the action of the courts in compensation cases shall be summary and free from technicalities. It is only by such summary administration, conducted in a manner that is fair to both employer or insurer and to employee, that compensation laws can fully accomplish their purpose in those unfortunate cases to which they are applicable.

REFERENCES

Much of the literature which relates to compensation administration appears in the form of reports issued by the different administrative bodies, and in the volumes of decisions in compensation cases which have been issued in several of the States. No attempt is made to enumerate these publications in this list, but the reader is referred to them for specific information regarding the administration of the law of any particular State. A few general references are given here, as follows: —

Compensation Administration, F. B. Merrels, Liability and Compensation Lectures, page 98.

Administration of Compensation Laws, O. R. Beckwith, Liability and Compensation Lectures, page 102.

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CHAPTER X

SOME SOCIAL ASPECTS OF WORKMEN'S COMPENSATION

The subject of workmen's compensation, except when it is considered in its narrower aspect of the obligation which the system imposes on the employer to pay indemnity to an employee who receives accidental injuries in the course of his employment and arising out of it, cannot be considered as an isolated instance of a certain form of social progress, but the movement must be considered as a world movement and in its proper place in the programme of social reform. It may as yet be too early to obtain the proper perspective with which to view this movement, and thus assign to it its exact place, and no attempt will be made to do this in this chapter, but there are certain social aspects of the matter which demand consideration in any practical study of the subject and some of the most prominent of these practical factors must be briefly considered. Two in particular are selected: First, the element of conservation in the way of accident prevention which is emphasised by the compensation system; and, second, the extension of the principle of social insurance which the system suggests.

The fact has already been noted and emphasised that the compensation system is fundamentally a repudiation of the individualistic theories upon which the common law system of employers' liability was based, and upon which the economic doctrines prevailing at the time of the inception and development of this system were also based. Viewed from

the cold, unsentimental and unsympathetic standpoint the compensation system takes the element of individuality from the employee and places him on practically the same basis as the other tools of industry. This is a legal recognition of the economic fact that under the present industrial system the individual has become simply one of the cogs in the system, but compensation distinguishes between the animate and the inanimate tools, for when an inanimate tool of industry is destroyed or its usefulness is over it is discarded and another put in its place, but when an animate tool is broken the compensation system says that industry must bear a certain share of the financial loss which it has caused. Thus industry is not allowed simply to discard the human resources which have been consumed in the process because of some casualities.

The compensation laws by their terms are concerned principally with provisions for the assumption and distribution of this financial loss. The laws themselves do not appear to place any emphasis upon the element of conservation which is one of the essential factors in the system. Attention has been directed in the previous chapters to some of the different forms in which this element of conservation manifests itself, but this consideration has been directed principally to the elimination of the waste which was one of the incidents of litigation under the common law system, by removing many of the elements of uncertainty which made litigation necessary and substituting elements of certainty which rendered litigation unnecessary. Conservation in this form relates to the elimination of financial waste; conservation in another form relates to the elimination of waste by preventing the accidents and the resulting injuries for which compensation is payable, and thus conserving the human resources upon which industry is dependent. It is through this

aspect of the element of conservation that the compensation system will reach its highest form of social usefulness.

This form of conservation in the shape of accident prevention cannot be considered an invention of compensation, for the problem of accident prevention and the consequent conservation of human resources had been a pressing social problem long before the enactment of any compensation laws in the United States, and many different forces had been actively working to devise methods of preventing the terrible slaughter which seemed to be an almost inevitable incident of modern industry, but when the compensation system was introduced and the obligation placed on employers to compensate for all accidents of industry the natural result was that the prevention of such accidental injuries became a matter of paramount importance, and so this element of conservation must be regarded as an important unofficial factor in this system.

Speaking in a general way it may be said that the efforts for conservation and accident prevention have been conducted along two well defined lines, official and unofficial. Many statutes have been passed from time to time which had these objects in view, and the statutes and the methods adopted for their administration and enforcement constitute the official means. Many efforts have been made by those interested in the problem, both from humanitarian and commercial standpoints, to conserve the human resources of those engaged in industry, and to reduce the loss of life and limb to the lowest possible minimum, and these efforts constitute the unofficial means.

The purpose of labour legislation is to improve the condition of the working classes, and so all legislation of this nature is based essentially on principles of conservation. The mere prevention of accidents is only one of the elements

of this subject of conservation, for that deals with the present aspect of the subject in that it attempts to save the individual himself from bodily injuries because of the hazards to which his employment exposes him. In its broader aspect this subject of conservation considers the future as well as the present, for by regulating the employment of certain classes, such as women and children, by regulating working conditions and hours of labour, and by prescribing the conditions under which hazardous employments shall be conducted, the attempt is made to conserve future generations, for if the energy of the present generation is weakened by unnecessary industrial exposure a part of the penalty will necessarily be imposed on the future. The employment of women and children at work which is beyond their strength or for excessive working hours, and the unregulated employment of men at work which exposes them to dangers of physical degeneration, is a positive harm to society, so the prevention or regulation of such employment is as vital as the prevention of injuries which result from industrial accidents and is an essential part of the conservation movement.

The general classifications into which labour legislation is divided have been considered briefly in a previous chapter,[1] and mention is made of these classifications in this chapter only for the purpose of showing the relation of the different classifications to the principle of conservation in the compensation movement. The laws which relate to safety and health concern both the present and the future aspects of this subject of conservation, for those regarding safety attempt to prevent industrial accidents while those regarding health attempt to conserve the energy of the workman and his posterity. The laws regulating the employment of women and

[1] See Chapter IV.

children concern the future more than the present, for it is the object of such laws to prohibit the employment of those classes in some operations and to regulate their employment in those operations in which their employment is legal. Aside from these laws women and children when legally employed are subject to the general labour laws. The laws regarding employers' liability relate only indirectly to this subject of conservation. Their application is particularly to the establishment of the liability of an employer for damages after an accident has occurred and injury has resulted.

The laws relating to safety have a direct bearing upon the compensation laws, for it is their purpose to prevent industrial accidents by requiring employers to eliminate certain definite conditions which may be productive of accidents. By preventing accidents the burden of compensation is lessened, and so the system offers a practical incentive for such prevention. The laws which relate to the preservation of the health of employees do not at present have such a close connection with the compensation system as those which relate to the safety of employees, for practically all of the compensation laws are now confined in their operation to personal injuries which arise from accident and do not include personal injuries which arise from disease that may be contracted in the course of employment. It is the purpose of these laws to protect employees as far as possible from exposure to disease in connection with their work, whether such disease comes in the category of occupational disease or not, but as long as this exposure does not subject the employer to any liability under the compensation system these laws have no direct connection with that system. If it develops, however, that the compensation laws are extended to cover occupational disease, or disease which may be con-

tracted in the course of employment regardless of whether or not it is peculiar to any particular occupation, the interest of compensation in this class of laws will be just as vital as it now is in those laws which relate to the safety of employees.

Viewed from another standpoint, however, it may be considered that the laws which attempt to conserve the health of employees have a direct connection with the compensation laws. This is the standpoint of practical compensation administration. Although the greater number of the laws do not as yet cover occupational disease or disease which may be contracted in the course of employment, still if the bodily powers of resistance of a workman are so impaired by any of the occupational hazards to which he may have been exposed that when after an accidental injury has been sustained in the course of employment the disability is prolonged for a period beyond which it would have taken for recovery had the workman been in good physical shape, compensation must be paid for this additional period of disability. It is one of the maxims of compensation that, as far as his physical condition is concerned, an employer must take an employee as he finds him and not as he should be. The result of this principle in practical operation is that a minor injury to an employee who is already physically impaired may result in prolonged disability and compensation must be paid for the entire period, so it is to the interest of the employer to see that employees are not exposed to any unnecessary dangers of physical impairment in connection with their occupation, and from this standpoint it can readily be seen that the laws which relate to the conservation of the health of employees have a direct bearing on the compensation system.

The laws which regulate the employment of women and

children have a direct connection with the compensation system, for while only a few of the laws make any direct reference to the fact that the employment of some classes is illegal, the inference which may be drawn from all of them is that they apply only to persons whose employment is legal. The result is that as to employees whose employment is in violation of law the rules of the common law apply, and as illegal employment in effect constitutes a *prima facie* case of negligence against the employer he has little or no defence in cases where employees who are employed in violation of law are injured in connection with their employment. As to women and children whose employment is in accordance with the statutory regulations the compensation laws apply just the same as to other employees.

That classification in labour legislation which was designated as "employers' liability laws" has been entirely superseded in the occupations to which the compensation laws apply. The object of the employers' liability laws was to specify in a general way the liability of an employer for injuries received by an employee during the course of his employment, and as the compensation laws make the employer liable for all accidents to which they apply they supersede laws of this class, so the employers' liability laws are rendered obsolete by compensation legislation as to those occupations to which the compensation laws are applicable.

All of these laws which have had for their object the conservation of workmen by seeking to prevent industrial accidents and to remedy conditions which might prove detrimental to their health, and the regulation of the employment of women and children, have been commendable in principle, but it is an unfortunate circumstance that they are not self-executory and if not properly enforced their effect is lost. Their intention is beneficent, but when a law imposes cer-

tain obligations on an employer and then does nothing to see that those requirements are observed it is rendered nugatory unless the employer voluntarily fulfils the obligations which are imposed on him. As a general proposition these laws have not been enforced in the United States with a sufficient degree of efficiency to give them their full effect, so they have failed to accomplish their full purpose. Their enforcement, except by voluntary action on the part of employers, requires a highly organised and highly efficient system of factory inspection, and as this system has been developed in but few of the states in this country many of the provisions of the labour laws have been poorly enforced and the official methods adopted to conserve the working people have to that extent failed in their purpose.

The unofficial efforts which have been made to prevent industrial accidents and to conserve the health of working men have, in a general way, arisen from two motives. Those who have had no practical interest in the matter have undertaken the solution of this problem from humanitarian motives. Many employers, who of necessity have a vital interest in the problem, have attempted to see that the provisions of the law were observed in their establishments, and going further have perfected safeguards for situations to which the law did not apply so that the chances of accidental injuries to employees would be reduced to a minimum. While this action on the part of employers is based on humanitarian motives, there is another consideration which prompts it, and this consideration is one of enlightened selfishness, for by conserving the life, limb, and health of employees the employer will not only secure more efficient service from them but he will also avoid the waste and liability to financial loss that may arise from industrial accidents or physical impairment on the part of employees.

The spirit of any legislation is more efficiently carried into execution by voluntary observation of its terms by those who are subject to it than by any elements of compulsion in its enforcement, and this observation is particularly true in its application to the laws relating to the safety and health of workmen, for these laws have been much more effective in those establishments where employers and employees have combined to see that their provisions were enforced than in establishments where compulsion has been necessary. The co-operation of employers and employees has been a necessity, for even if employers have done their best to observe the legal requirements their efforts might be frustrated by employees who neglected or refused to use the safeguards which had been provided, or removed them after they had been installed.

The attempts to enforce the principles of conservation by unofficial methods have been conducted along various lines, but they have had the same end in view and their effect has depended, in the last analysis, upon the co-operation of the employer and the employee. Engineers have devised guards for dangerous machinery, and the manufacturers of that machinery have been requested to equip it with these guards as it is manufactured. Employers have been urged to place guards on machinery which is already in operation and on which practical guards can be placed. Different methods have been devised to protect the health of employees because of the occupational hazards to which they are exposed, and employers have been urged to see that these methods are adopted and observed by employees. Systematic efforts through organisations for safety work have been made by many employers, particularly large corporations employing thousands of employees, and the effect of organisation of this nature has been most beneficial, not only to the employer but

in its effect upon other employers and upon the conservation movement in general.

While large employers of labour can perfect safety organisations and avail themselves of the services of specialists along this line it is impossible for small employers to perfect organisations of this nature on the same scale, but an important unofficial factor has been of great assistance to the smaller employers in this matter and that is the attitude of the companies which have been writing liability insurance towards the problem of conservation. On the surface the function of liability insurance is to protect the legal liability of a policy-holder, but the managers of the liability companies have recognised the fact that the institution had a higher function to perform and that its social usefulness would not consist as much in compensating workmen who might have been injured by the negligence of the employer as it would in attempting to prevent the accidental injuries for which damages might be payable, and in view of this fact accident prevention became a recognised and established function of liability underwriting.

The liability companies, therefore, perfected safety organisations composed of experts in accident prevention whose duty it was to visit plants on which the company carried the liability and inspect them with a view to suggesting improvements in existing conditions which might reduce the possibility of accidental injuries, and this inspection service came to be regarded as an incident of liability insurance protection. The liability inspectors not only assisted employers in observing the provisions of the labour laws, but they suggested improvements which did not come within the legal requirements that might be of assistance in accident prevention and general sanitation. This service was only advisory, for the companies possessed no power to compel

their policyholders to comply with any recommendations that might be made, but as the policyholders could usually see the reasonableness of the recommendations, and as the companies would hesitate to continue with their insurance on plants where their recommendations were disregarded the service was effective.

Another element in liability insurance which became a factor in emphasising the conservation function was the system of schedule rating which was established in connection with liability risks. This system is analogous to a somewhat similar system which has been developed in connection with the rating of risks for fire insurance, making allowances for certain features of construction or protection which may tend to prevent or arrest fires, and it gives a policyholder credit on his liability rate for the efforts which he may make to prevent industrial accidents, thus making such prevention a direct financial benefit to him.

Accident prevention by means of both inspection and schedule rating has received a great impetus under the compensation system, for as conservation is such a vital element of the system methods which tend towards the accomplishment of this principle must necessarily become important factors in the system. Accident prevention as a science is almost in its infancy, and schedule rating for liability and compensation risks has been in operation for such a short time that it is as yet too early to form any permanent opinion as to its value, but on principle it seems as if its effect will be beneficial and that it will help in the solution of the problem of accident prevention.

This movement for the prevention of accidents to employees was doubtless responsible to some extent for the inception of the movement to reduce all preventable accidents, for the agitation for the prevention of such accidents has

received a decided and noticeable impetus during the past few years. The activities of modern life, both industrial and social, have been productive of many accidents, involving immense economic loss, which arose independent of the occupation of the injured, and as it has appeared that a large proportion of these accidents were preventable as well as many of the industrial accidents the movement for the prevention of accidents in general has followed as a logical development of the agitation for the prevention of industrial accidents, and "safety first" has become one of the familiar slogans in all of the activities of modern life. The adoption of the compensation system has doubtless been one of the factors which has helped in this movement, and due credit must be given to the system for this assistance.

Before considering the extension of the principle of social insurance which the compensation system suggests, it may be well to consider briefly some of the extensions in the compensation laws themselves which the defects in the present laws have suggested, for as the laws were untried and experimental in their nature their practical operation has shown many defects and as a consequence demands have been made that the laws be amended so as to correct these defects. The experience of the brief period during which the system has been in operation is that many of the laws have been amended so as to increase the benefits to employees, and it seems probable that the provisions of the different laws will be further liberalised in favour of employees as practical defects are shown and emphasised.

The laws which are now limited in their application should be amended so as to be of general application. There may be certain employments which on grounds of expediency may be exempted, but such exemptions should be few. The exemption of domestic service is almost universal, and inas-

much as it is not an employment which is conducted for profit there may be some justification for the exemption. The exceptions which exempt agricultural service are less defensible, for that work is almost always conducted for the profit of the employer and the occupation is one which is classified as "hazardous" by the companies writing personal accident insurance, so these employees need the protection of the compensation laws. Employment which is merely casual and at the same time is not in the course of the business of an employer may well be exempted from the laws, but employment which may be only casual but which is at the same time in connection with the business of an employer should be included, for there seems to be no logical reason for this exception.

The basic principle of compensation is that industry shall bear its proportional share of all of the financial losses which arise from industrial accidents, and it is inconsistent with this principle that there should be any general distinction in occupations, including some under the compensation laws and leaving others still subject to the rules of the common law. The reason for this distinction is that some occupations are regarded as essentially hazardous and others regarded as non-hazardous, and the consideration which influenced the adoption of the limited laws was one of expediency, but this distinction is based on a wrong premise and the consideration of expediency can be defended only on the ground that a limited compensation law is better than none, for it will establish the principle and will thus pave the way for a removal of the limitations. The experience of other countries has been that the limitations were eliminated and the compensation laws made of general application, and it seems reasonable to assume that this will be the result in those

states of the United States in which the compensation laws are now limited in their application.

Efforts will doubtless be made to reduce the waiting period in the different laws, and in fact some have already been so amended. The principle of the waiting period is regarded as sound, in order that compensation will not have to be paid for minor injuries involving only very short periods of disability, and as a prevention against malingering, so it is doubtful if it will be eliminated, but the probability is that it may be reduced so as to bring the period down to one week or less.

The tendency is to liberalise the provisions regarding statutory medical aid. Practical experience has shown that the limitations on this feature of the compensation system involve annoying administrative difficulties, for when treatment which extends beyond the limits is necessary the question is as to who shall bear the expense if this treatment is rendered. As a practical proposition the treatment is frequently furnished by the insurance company, particularly in cases where it appears that proper medical or surgical treatment will reduce the disability period and thus reduce the payment of compensation. It will, therefore, be a relief to insurers to see this provision extended, but any extension granting unlimited treatment should be subject to rigid supervision on the part of the administrative authorities so that the demands on the insurers would not be excessive.

Some of the laws have already been amended so as to increase the indemnity payments, and it is probable that many of the other laws will be similarly amended. The tendency is both to increase the percentage payable and the total amount to be paid or the period during which the indemnity is

payable. Fifty per cent of wages seems inadequate, so the demand is that the proportion be increased to sixty-six and two-thirds per cent. There is no logical reason why in cases of long continued or permanent disability the payments should not be made during the continuance of the disability, or during the dependency in fatal cases, and so the removal of the time limitations may be anticipated, for this is necessary in order to give the system full effect.

Coverage for occupational diseases is something which may reasonably be expected to be included in the compensation laws, and there is no reason why such coverage should not be afforded. This will have to be accomplished by amendments to the laws unless the courts reverse decisions already made, for the greater number of the courts of last resort which have passed on the issue have decided that occupational diseases do not come within the coverage of the present laws, for they seem to contemplate only personal injuries which result from some acts of violence and not those which arise from disease caused by occupational hazards. There is no logical basis for this distinction, because the danger of exposure to occupational disease is just as great in some forms of modern industry as that of exposure to industrial accidents, the disability caused by the one is just as real as that caused by the other, it arises from an occupational exposure, and it is a manifest injustice when industry is compelled to compensate the victim of an industrial accident and is not at the same time compelled to compensate his fellow employee who may be suffering from an occupational disease. It may be assumed, therefore, that coverage for occupational diseases is one of the compensation developments of the near future.

The compensation system by compelling the employer to insure the payment of the obligation which it imposed on him

emphasised the principle of collective insurance. It is only natural, therefore, that as this principle is emphasised by being constantly called to the attention of both employer and employee the extension of the principle is suggested, and consideration is given to its application for other insurance for the benefit of employees. The accident insurance protection afforded by compensation insurance extends only to accidents which happen during the course of employment and arise out of it, and it only indemnifies the injured for a portion of his financial loss. This leaves a workman exposed to the dangers of non-occupational accidents without any insurance protection unless he carries it voluntarily, and only partially protected for accidental injuries caused by the hazards of industry. It can be seen, therefore, that the compensation system immediately suggests an extension of the principle of accident insurance for non-occupational accidents and for the balance of the financial loss over and above the indemnity granted by the compensation laws.

In theory each individual workman may protect himself by accident insurance for the hazards which the compensation laws do not cover, but in practice this is almost impossible. The cost of such insurance is excessive, and its underwriting has not been developed to any great extent. The compensation system, however, by requiring the insurance of employees for occupational injuries on a collective rather than on an individual basis shows the way to protect employees in a similar manner for accidents which do not happen in connection with their work, and also for the excess of the financial loss beyond that covered by the indemnity paid under the compensation laws. Although this form of group accident insurance has not as yet been developed to any great extent it is one of the underwriting possibilities which is suggested by the compensation system, and there seems to be

no reason why its development should not be anticipated.

Accident insurance for workingmen has been conducted largely on the so-called "industrial" plan, which because of the way in which the premiums are collected makes the cost of conducting the business large, and this in addition to the hazardous nature of the employments in which workingmen are usually engaged makes premium rates high for them and the cost of adequate protection practically prohibitive. Although the compensation laws do not permit the employer to deduct any portion of the wages of his employees to pay the premium for compensation insurance, there is nothing to prevent an employer from securing collective accident insurance for his employees for non-occupational accidents and making an agreement with the employees to deduct the expense of this insurance from their wages, and thus eliminate many of the elements of expense which are incident to the issuance of individual policies.

While this idea of writing accident insurance for employees on a collective basis for non-occupational accidents has not as yet been developed to any great extent as a result of the adoption of the compensation system, there has been a marked impetus to another form of collective insurance by and through employers for the benefit of their employees, and the development of this form of underwriting has been so noticeably contemporaneous with the adoption of the compensation system that it is reasonable to assume that the principle of collective insurance suggested by compensation is one of the factors which has assisted in its development. The line referred to is that of life insurance on the group plan, which has become very popular during the past few years.

The group life insurance policy as now written is a contract made between the insurance company and the employer whereby each one of the employees is given a certain amount

of life insurance. This form of life insurance has many advantages over the issuance of an individual policy to each employee, and it may be regarded as a decided step in advance in social progress. The plan provides this insurance for many who otherwise would not carry it, and additional insurance for those who are already insured on their own account. The expenses of solicitation and administration are greatly reduced by insurance on the group plan, for the proportion for agents' commission is much lower, the expense of medical examination is almost eliminated by substituting an inspection of the group as a whole for an individual examination of each applicant, and the expense of premium collection is very much reduced by dealing with one party, the employer, rather than with a large number of individual policyholders. The form which group life insurance has thus far assumed, to a great extent, is that of a gratuity on the part of the employers to employees, and an incentive to faithful and continued service is given by making the insurance plan operative after a certain number of years in the employ of an employer and then by increasing the amount of insurance for each succeeding year of service up to a certain amount. There seems to be no legal reason, however, why employees cannot have this insurance effected through their employers as a matter of convenience and economy for themselves, the premium payments being deducted from their wages by the employer and transmitted to the insurance company.

The extensions suggested by the compensation laws in the United States along the lines of social insurance are as yet more or less speculative in their nature, but reasoning from the analogy of the experience with the compensation systems in other countries and considering the agitation already in progress in this country for the application of certain prin-

ciples of social insurance, it seems reasonable to assume that there will be many developments along these lines. By the term "social insurance" is meant the extension of the insurance principle, accompanied by a certain degree of compulsion, for the protection of certain classes against contingencies against the effects of which they are unable to protect themselves, or against which they will not, in the absence of compulsion, provide the necessary protection. Applied to the working classes the principal forms of insurance of this nature which are suggested are accident insurance, health or sickness insurance, maternity benefits, old age pensions, and insurance against unemployment. Insurance against industrial accidents has to a certain extent been developed by the compensation system; that system cannot of itself establish a system of social insurance for those other contingencies, but by emphasising the insurance principle it has shown how it might be applied to them.

It is interesting to note the experience of other countries, particularly that of Germany and England, in the establishment and development of their social insurance systems. The conditions in this country correspond more to those in England than they do to those in Germany, so as far as there may be any similarity in the development of the systems it seems as if our experience will be more similar to that in England than to that in Germany. The component parts which constitute the German social insurance system, sickness insurance, accident insurance, and old age pensions, were all adopted within a short period of time as parts of a well defined system, and this was in pursuance of a definite programme of social reform undertaken by a strong imperial government. The different enactments which together constitute the English social insurance system were passed in accordance with a party programme in which a very large place was ac-

corded to legislation along social lines, and although the proposed social legislation centred to a certain extent around the plans and personality of Mr. David Lloyd George it can hardly be said that he conceived the plan and forced it through in the arbitrary and autocratic way in which Bismarck forced the German social insurance system upon Germany.

The German system was for a number of years the subject of much hostile criticism in England, so the conversion of England to the principle of social insurance is all the more significant. While technically the English compensation law cannot be considered part of a social *insurance* system because of the fact that the insurance of the compensation obligation is wholly optional with the employer, in practice the obligation is usually secured by insurance and so the compensation act may be considered as the cornerstone on which the English system of social insurance is based. In addition to the compensation act, which was made applicable to all occupations in 1906, the system consists of an old age pension scheme, adopted in 1908 and extended in 1909, a system of sickness insurance established by the National Insurance Act of 1911, and an experimental scheme of insurance against unemployment, limited in its scope to the building and engineering trades, also established by the National Insurance Act. The old age pension scheme is supported wholly by the government. The sickness insurance system is administered through the medium of "approved societies," which must not be conducted for profit; the system is supported by contributions from the employer, the employee, and the state. The system of unemployment insurance in those trades to which it is applicable is a direct state insurance plan. It is supported by contributions from the employer, the employee, and the state, but the trade unions are

utilised in the administration of the fund, for they are allowed to act as agents of the state in receiving dues and paying the benefits, being reimbursed for the benefits paid from the National Unemployment Fund.

The traditions in the United States were similar to those in England and antagonistic to anything in the way of the compulsion which is incident to the establishment of a social insurance system or any part of it, so the compulsion to insure under the compensation laws was an innovation and there was much speculation as to the operation of this feature of the laws. Generally speaking, it may be said that the operation of the laws has been more satisfactory in those states where insurance has been compulsory and a strong system of administration has been provided than it has in the states where insurance was optional and the administration of the laws left with the courts. The operation of these features of the laws has, therefore, shown that it may be possible to establish other elements of a social insurance system on somewhat the same basis, and the logical outcome of the establishment of the compensation system has been an agitation for the establishment of some of these other elements.

The practical constitutional situation regarding the establishment of the other elements of a social insurance system in the United States is just the same as it was regarding the establishment of a compensation system, for while the different social problems which may demand the establishment of such a system are national in their scope they are local in their solution, and the legislation which would establish it must be by the states rather than by Congress. This situation may, therefore, give rise to a diversity of suggested solutions for common problems, for each state will doubtless consider the matter on the basis of any local variations that

may exist rather than on the basis of a uniform solution of the situation, and the result may be a much greater lack of uniformity than now exists in the compensation legislation in this country.

Inasmuch as the agitation for some of the other forms of social insurance aside from workmen's compensation is just beginning in the United States, it is as yet too early to review the movement or to forecast its result. Its present form is an agitation on the part of many who are interested in the matter from a theoretical standpoint for the establishment of a compulsory health insurance system for wage workers, and investigations by commissions in several different states regarding the general problem of social insurance and the feasibility of the establishment of any or all of the different parts of a comprehensive system. The present status of this agitation, in brief, is that the necessity for the establishment of such a system is admitted by all students of the problem, but that the solution of the problem suggested by economic and social theorists is questioned by those who are interested in the problem in its practical aspects.

The American Association for Labor Legislation, which was organised during the agitation for the establishment of a compensation system and immediately became active in that propaganda, has now taken up the matter of the establishment of a system of compulsory health insurance and has presented the most tangible plan that has as yet been presented for the establishment of such a system. This plan will be outlined very briefly in this chapter without comment as to its constitutionality or practicability. It may develop that this suggested system is neither a constitutional nor a practical solution of the problem, but even if this is the result the suggestion may serve as a working basis upon which some solution of the problem will be reached.

The plan suggested by this association has taken the form of a tentative draft of an act for the establishment of a system of health insurance. This act contemplates that this insurance shall be compulsory for wage workers earning less than a given annual amount, and voluntary for those persons who for practical reasons are kept out of the compulsory system. The plan is to be supported by joint contributions from the employer, the employee, and the state. Health insurance should provide for a specific period of disability only, but a system of invalidity insurance should be established in the same law. This insurance should be carried in mutual funds, managed by employers and employees under public supervision. Medical and hospital services should be included in the system. The element of conservation should be recognised, and a campaign for health conservation inaugurated similar to the safety movement emphasised by the compensation system.

Although this plan may not be established as proposed, it seems reasonable to assume that the agitation for a system of health insurance will eventually result in the establishment of such a system, and that when a system of health insurance has been established agitation will then commence for the establishment of other parts of a system of social insurance. Reasoning from the analogy of the experience of other countries this seems to be but a logical development, and as far as this country is concerned the entering wedge in this development appears to have been the establishment of a system of workmen's compensation.

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APPENDIX A

THE WORKMEN'S COMPENSATION MOVEMENT IN NEW YORK

Throughout this book the workmen's compensation problem has been treated as one which is national in its scope and importance, although frank recognition has been given to the fact that because of the constitutional situation in the United States the solution of the problem has rested with each individual state, as it is a matter over which Congress possesses very limited jurisdiction. In view of the fact that the problem is one of national importance the progress of the movement has been traced in chronological order in the United States as a whole rather than in any of the individual states, but because of the practical situation and the fact that several of the states have distinct histories in this movement, references were appended to Chapter VII giving in chronological order the documentary landmarks of this movement in several of the states in which the agitation has been distinctive.

In recognition of this practical situation it is believed that it would be well to outline the history of the movement in one of the states which has had a distinctive history, and which history may be illustrative of the difficulties that the attempt to enact workmen's compensation laws that would stand the test of constitutionality has encountered, and for this purpose the state of New York is selected. The first workmen's compensation bill introduced in any state legisla-

ture in this country was introduced in New York; the first exhaustive investigation made regarding the enactment of workmen's compensation legislation in any state was made in New York; the first comprehensive legislation along this line to be enacted in any state was enacted in New York, one part of which was to fail because it did not stand the test of constitutionality, and the other because it was inoperative in practical operation; a constitutional amendment was passed there which gave the legislature the power to enact a compulsory workmen's compensation law, and such a law was enacted in accordance with the authority thus granted by the people, and in other respects the history of the movement in New York has been both distinctive and typical, so, at the risk of duplication of some of the facts already mentioned, a brief outline of that history is given.

The bill introduced by Senator Ford in the New York Senate in 1898 has been referred to in the text. This was the first workmen's compensation bill to be introduced in this country. The bill had its inception in an unofficial movement on the part of a number of students of social problems who were ahead of their time, so their efforts were naturally doomed to failure as far as any present results were concerned, for their proposition was misunderstood and the times were not ready for the change which the bill contemplated, but the movement did result in a modification of the common law rules to the extent of the passage of an Employers' Liability Act, based upon the British Act, a few years later. It was something like ten years after the introduction of Senator Ford's bill before the agitation for a system of workmen's compensation in New York became very active, but in the meantime the Department of Labor of the State had been active in the presentation of the problem through its Bulletin, and had published considerable matter

regarding the solution of the problem in other countries and the discussions in other states.

The Commission which was appointed in New York in 1909, by virtue of Chapter 518 of the Laws of 1909, to inquire into the matter of the substitution of a workmen's compensation system for the common law system of employers' liability did its work in a very thorough and exhaustive manner. All interests were represented on the Commission, and all parties had ample opportunity to be heard at the different hearings which were held by the Commission. The proceedings of the Commission were watched all over the country, for the investigation came at a time when many were awakened to the necessity of a drastic change in or the abolition of the common law system and it was anticipated that the action taken by New York would prove the entering wedge in the adoption of a workmen's compensation system or some other substitute for the existing system of employers' liability in the different states in the United States. The First Report of this Commission was presented to the Legislature of New York under date of March 19, 1910. This report was very comprehensive in its nature, containing the recommendation of the Commission as to legislation which it proposed as a substitute for the common law system, numerous suggestions regarding the present status of the situation in this country, a summary of the systems in operation in European countries, and a transcript of the testimony taken by the Commission at the different hearings.

The Commission recommended legislation along two lines and submitted drafts of two bills drawn in accordance with its recommendations, one a compulsory compensation act, the other an elective compensation plan. Both of these laws were passed in 1910 substantially as recommended by the Commission. The compulsory act applied to certain "espe-

cially dangerous" classes of employments, but the employments named were very limited as compared with the occupations classified as "hazardous" or "extra hazardous" in the limited compensation laws which were subsequently passed in the states that adopted the principle of limitation in their compensation legislation. The practical argument against the inception of such legislation that the state first adopting the system would place its employers at a disadvantage in competition with the employers of other states because of the increased cost of the system, was in effect eliminated by making the law apply to employments which were non-competitive in their nature as far as outside competition was concerned, for it did not apply to manufacturing operations generally. The law establishing the elective compensation plan filled in the gap left by making the compulsory law limited in its application, by providing that employers and employees might by voluntary agreement adopt a compensation plan which gave the same benefits as the compulsory law, as a substitute for the common law system. Both of these laws failed in their purpose, for the compulsory law was soon declared unconstitutional, and employers and employees generally failed to avail themselves of the privilege of election offered by the voluntary compensation law.

The decision of the Court of Appeals of New York in the case of *Ives v. South Buffalo Railway Company,* 201 N. Y. 271, 91 N. E. 431, holding that the compulsory compensation law of New York was unconstitutional, was the most dramatic and the most important event in the history of the workmen's compensation movement in the United States. The case must be considered as one of national rather than of local significance, for the whole country was watching the result of the experiment in New York. The law went into effect on September 1, 1910, and this decision was rendered on

March 24, 1911. The case was pushed through with all possible haste so that the status of the law could be determined and announced with as little delay as possible.

The incident which contributed the dramatic effect to the decision in the *Ives* case was the fire in the shop of the Triangle Waist Company, in New York City. This company occupied the three upper floors of a ten story fire-proof loft building in New York. A fire broke out in their shop, and because of the rapidity of the spread of the fire and inadequate means of escape nearly one hundred and fifty employees of the company, mostly young women and girls, lost their lives. A spectacular feature of the disaster was that many of those who were killed leaped from the upper stories of the building to death on the pavement below. This calamity happened just after the decision of the Court of Appeals, but within twenty-four hours of it.

While this disaster had but little direct bearing on the pending compensation situation, for the law which had been declared unconstitutional did not apply to operations such as those of the Triangle Waist Company, yet coming as it did at a time when the court had just declared that the legislature had no power to compel the employer to protect the employee against the economic effects of industrial accidents the direct effect was that the decision of the court and this terrible disaster stood out in bold relief and emphasised very strongly the shortcomings of the existing laws, and the laxity of the administration and enforcement of such laws as did exist, for in its final analysis the cause of the disaster could be attributed to inadequacy in the laws providing for proper methods of escape in case of fire for persons employed in such buildings, and to a division of responsibility and consequent inefficiency in the enforcement of such laws as did exist. However, the two events were contrasted in many of

the comments that were made on the decision of the court.

It is evident that the Court of Appeals was not unmindful of the economic and sociological considerations which were urged in support of the statute, for they so stated in the opinion, and they summarised the provisions of the report of the Commission regarding the necessity of the abolition of the common law system. It seems that the members of the court would have been glad to have sustained the validity of the law if they could consistently have done so, but they came to the conclusion that it was in plain violation of certain constitutional guarantees and so the only course open to them was to declare it invalid. The gist of the decision was "that in its basic and vital features the right given to the employee by this statute, does not preserve to the employer the 'due process' of law guaranteed by the Constitution, for it authorises the taking of the employer's property without his consent and without his fault," and so it was held that it was unconstitutional.

It was argued in support of the law that in view of the changed economic and social conditions since the adoption of the constitutional guarantees the right given to the employee under the statute was but a legitimate and justifiable extension of the police power, but the court denied this contention after a full examination of the authorities regarding the use and application of the police power. The court suggested that the remedy for any such change as that contemplated by this statute lay with the people, who possessed the power of modification of the fundamental law, and so the way was shown for a constitutional amendment which would give the legislature power to pass legislation of this nature.

This decision met with much more criticism than approval, or the critics of it were much more vigorous in their denunciation than those who approved of it were in its defence.

The promoters of the legislation were naturally disappointed at the result, for they had hoped that the court would recognise the extension of the police power to this new field, but they gave the court the credit of having approved the principle of the legislation while at the same time deciding against its validity. The feeling against the court for this decision was considerable, and the defeat of one of the Justices when he came up for re-election at the expiration of his term was attributed by many to his action in this case. If so this is a lamentable instance of unwarranted punishment for conscientious performance of judicial duty, for the court was unanimous in its decision and there was no serious criticism of the motives of any of its members in reaching the result.

It has already been noted that the law which provided for the substitution of the compensation system for the common law system, in those occupations to which the compulsory law did not apply, by voluntary agreement between employer and employee, proved inoperative because no such agreements were made. This result might have been anticipated if the experience in Massachusetts under a statute similar in principle had been investigated, for such a statute was passed in Massachusetts in 1908 and was inoperative because no agreements were registered under it. The practical defect in both of these statutes was that there was no element of compulsion to cause either employer or employee to elect their provisions and no penalty for failure to elect. The failure of the compulsory law in New York because it was declared unconstitutional and the failure of the voluntary laws in Massachusetts and New York because they were inoperative, caused the students of the subject and legislators in other states to devise a method by which a law could be drawn that would in theory be voluntary but would in effect be compulsory,

and thus the elective compensation law, which is a distinctive feature of our compensation legislation, came into being. This principle was adopted by the legislatures of several of the states during the sessions of 1911. These laws while theoretically elective penalise both employer and employee for failure to elect to such an extent that election in the states which have passed them is practically universal, so they are effective in practical operation, and as their constitutionality has been sustained they have obviated the constitutional obstacles which seemed to prevent compensation legislation in this country.

The Commission was still in existence when the decision in the *Ives* case was rendered, and the challenge of the court that only the people possessed the power to authorise such legislation as the Commission had proposed was promptly accepted. A little more than a month after the decision was announced, on May 3, 1911, the Commission filed a Fourth Report with the Legislature. This report reviewed the action of the court in the *Ives* case, and suggested that there were four possible lines of action open to the Legislature, as follows:—

First: Drastic changes in the common law rules which would increase the liability of the employer, but which might not diminish the evils of the present system.

Second: An optional compensation law drawn on the lines of the statute that had just been passed in New Jersey, but it was felt that such a law might be unconstitutional, and that it might be ineffective in operation because employers and employees generally might fail to accept it.

Third: A compensation plan that would be effective only as to corporations organised since the adoption of the Constitution, as to which the Legislature had the power to revoke their charters, but this suggestion offered only a partial

solution of the problem, for it would not apply to the older corporations and to partnerships or to individual employers.

Fourth: A constitutional amendment authorising the Legislature to pass a compensation law. The fourth suggestion was the one recommended to the Legislature.

The Commission reported a draft of a proposed constitutional amendment to the Legislature, but when the amendment was presented an element of partisan politics entered into the situation. The Senate in the meantime had become Democratic while the Assembly was Republican. The amendment as recommended by the Commission was introduced in the Senate, and another drawn along slightly different lines was introduced in the Assembly. The Democrats contended for the Senate amendment in order to get credit for it, and the Republicans contended for the amendment proposed in the Assembly. The contest was continued until near the end of the session, when in order to avoid a failure of the amendment the Senate gave in and the proposal recommended by the Assembly was adopted. It was passed in the same form by the next Legislature, and submitted to the people and adopted in November, 1913. The amendment, in brief, empowered the Legislature to provide for the establishment of a compensation system for injured employees, regardless of whether such injuries were received by reason of the fault of the employer, and to provide that the remedy thus established should be exclusive.

Soon after this amendment was adopted the Governor of New York called a special session of the Legislature to act upon several matters of pressing importance, one of which was the workmen's compensation law. Before the Legislature met a compensation bill was drafted by the Insurance Department and presented to the Governor, who called a conference for the consideration of the bill as drawn. It ap-

peared that the bill was unsatisfactory and defective in several essential particulars, so the matter of its revision was entrusted to several gentlemen who had given particular attention to the subject. When the bill as redrafted was presented to the Governor a conference of the leaders of both houses, representatives of labour, and others interested in the matter was called, which conference agreed upon a bill that was to be submitted to the Legislature. It was proposed that this bill should be passed without a public hearing, but the demand for a hearing was so strong that one was held. However, no changes of importance were made in the bill, and it was passed and became a law on December 16, 1913.

The passage of this bill at that time raised an interesting constitutional question, more technical than practical in its nature. The constitutional amendment authorising the enactment of the law took effect on January 1, 1914, but the bill itself was approved on December 16, 1913. The law was not made effective as far as the payment of compensation was concerned until July 1, 1914, but some doubt arose as to whether the Legislature had the power to pass such a law before the constitutional amendment was actually effective, and so, in order to avoid all possible doubts as to the validity of the law, it was re-enacted with very little change by the next Legislature and became a law on March 16, 1914.

The law is compulsory, and is a limited compensation law applicable to a large number of specifically mentioned "hazardous employments." It may, therefore, be regarded as defective according to the best standards of compensation because it is not of general application, but it may be said in its defence that it applies to practically all employments in which there are any appreciable occupational hazards. It contains few exceptions, because limited laws by their very nature apply only to those occupations which are ex-

pressly mentioned or can be included by reasonable implication, so if any occupation is not expressly or impliedly included it is excluded, but it does contain the usual exceptions of farm labourers and domestic servants. The waiting period is two weeks, and the statutory medical aid is for sixty days without any limit as to the amount which shall be paid for treatment during that period. This provision is liberal as compared with similar provisions in the laws of some of the other states, but at the same time it is defective, for an injured employee should be entitled to receive such treatment, particularly in cases where it will expedite recovery and reduce his disability period, as long as it is reasonably necessary. In other respects the law ranks with the most advanced of the compensation laws. The payments for total disability are 66⅔ per cent. of wages and last for life. The payments to dependents continue during dependency. Insurance of the compensation obligation is required, unless permission for self insurance is obtained on proof of financial ability, and free choice of the insurance carrier is permitted. A summary system of administration is provided.

It was considered by many that the law might be unconstitutional because the constitutional amendment by virtue of which it was passed might in itself be in violation of the Fourteenth Amendment of the Constitution of the United States, but the Supreme Court of the United States has recently decided in favour of the New York amendment. In the case of *New York Central Railroad Co. v. White,* in which the New York courts decided in favour of the validity of the law and which was carried to the Supreme Court of the United States, the court decided on March 6, 1917, that the prescribed scheme of compulsory compensation was not repugnant to the Fourteenth Amendment, and that the in-

surance provisions of the law were a valid exercise of legislative power, so the law now stands as valid by virtue of the decision of the highest court in the land.

The law has been amended several times since its passage, but these amendments have been more in the nature of development than of change. Additions have been made to many of the classifications of employments covered by the law, and a provision has been inserted allowing employers and employees who are not subject to it to come under it by joint election. All of the payments to injured and dependents were at first made through the State Workmen's Compensation Commission, the insurers reimbursing the Commission for the payments made on account of their policyholders, but that procedure has been changed and the insurer now makes direct payments to the injured or to the dependents. The State Workmen's Compensation Commission, established by the law to provide for its administration, was abolished in 1915 and the administration of the law was vested in the State Industrial Commission, with practically no change in the details of administration. This Commission has supervision of the administration of the Department of Labor of New York, and it administers the compensation law as a part of its functions. It seems but logical that the compensation law should be considered a part of the general labour laws of a state, and that it should be administered in connection with the other labour laws, so the action of New York in this particular may well be taken as a precedent for action by other states.

APPENDIX B

STANDARDS FOR WORKMEN'S COMPENSATION LAWS

Mention was made in Chapter X of the activity of the American Association for Labor Legislation in the propaganda for the enactment of workmen's compensation legislation, and numerous references have been made in the different chapters to the publications of this Association. All of the publications cited have been listed in the Bibliography. In the references to Chapter VII a pamphlet published by the Association entitled "Standards for Workmen's Compensation Laws" was cited. This pamphlet embodies the standards recognised for sound workmen's compensation legislation at the present time by those who have given much study to the subject, and by permission of the American Association for Labor Legislation the pamphlet is reprinted here in the Appendix.

STANDARDS FOR WORKMEN'S COMPENSATION LAWS

Recommended by the American Association for Labor Legislation

In the opinion of the American Association for Labor Legislation the following features are essential to satisfactory workmen's compensation laws:

I. SCALE OF COMPENSATION. Assuming machinery to insure the prompt payment of the compensation required by law, the scale of payments is the most important feature of the system. The strongest argument for compensation to all injured workmen or to their dependents is that shortened lives and maimed

limbs due to industrial injuries are just as much expenses of production, which should be met by those conducting industry for their own profit, as are used-up raw materials or worn-out tools and machinery. The whole expense of losses to capital is necessarily borne by the employer. The whole expense of the personal losses due to injuries is the loss in wages sustained and the expenses for medical care during incapacity. The only logical reason for not imposing, through the employers, this entire expense on every industry that occasions it, is that injured workers must not be deprived of a motive for returning to work and to independent self-support as soon as they are able to do so. The compensation act, therefore, should provide for the expense of medical attendance up to a reasonable amount, and for the payment of such a proportion of wages to the victim of the injury during his incapacity, or to his dependents if he be killed, as will provide for the resulting needs and yet not encourage malingering. The following scale is believed to conform to these requirements and to be the lowest that should be inserted in any compensation law.

1. *Medical Attendance.* The employer should be required to furnish necessary medical, surgical and hospital services and supplies for a reasonable period (to be determined by the Accident Board). The Accident Board should be empowered to establish a schedule of physicians' and hospital fees and to control all such charges.

All of the acts except those of Alaska, Kansas, New Hampshire, Washington and Wyoming provide for medical attendance. In California, Connecticut, Maryland, Ohio, Oregon, Porto Rico and West Virginia, and under the federal law for government employees, the period during which such services and supplies are to be furnished is left to the discretion of the Accident Board. In California, Connecticut, Indiana, Maine, Massachusetts, Michigan, Nevada, New York, Oklahoma, Porto Rico, Rhode Island, Texas and Wisconsin, and under the federal law, this board controls the amount of such service and supplies. In Maine and Pennsylvania the amount payable may be in-

creased in the discretion of the board in case a major surgical operation is required. In Indiana, Kentucky, Maryland, New York and Oklahoma no charges of physicians and hospitals are enforceable unless approved by it.

2. *Waiting Period.* No compensation should be paid for a definite period—to be not less than three nor more than seven days—at the beginning of disability.

In Illinois, Louisiana, Maryland, Nevada, Ohio, Texas, West Virginia and Wisconsin, and under the federal law, the waiting period is as here recommended. In Oregon, Porto Rico and Washington there is no waiting period.

3. *Compensation for Total Disability.* The disabled workman should receive during disability 66⅔ per cent. of wages, compensation not to exceed $20 a week. If he is a minor, he should, after reaching twenty-one receive 66⅔ per cent. of the wages of able-bodied men in the occupation group to which he belonged. If his wages are less than $5 a week, his compensation should be the full amount of his wages.

All of the acts except those of Alaska, Oregon, Washington and Wyoming base the compensation on a percentage of wages, rather than on a flat rate regardless of the wages.

The percentage of wages here recommended is the same as in Massachusetts, New York and Ohio, and in the federal law. Porto Rico provides 75 per cent, California, Kentucky and Wisconsin provide 65 per cent, while Hawaii and Texas provide 60 per cent.

In California, Colorado, Illinois, Maryland, Montana, New York, Ohio and West Virginia compensation for permanent total disability is allowed for life, and in Nebraska, Oregon and Washington, and under the federal law, compensation for total disability is payable during the continuance of the disability.

The fact that the injured employee is a minor is recognised in fixing compensation in California, Colorado, Illinois, Iowa, Maryland, Massachusetts, New York, Ohio, Oklahoma and Wisconsin, and under the federal law.

4. *Compensation for Partial Disability.* The workman who is only partially disabled should receive 66⅔ per cent. of the difference between his wages before the injury and his wage-earning capacity after the injury, compensation not to exceed $20 a week, with provisions for minors, and for workmen earning less than $5, similar to those in the case of total disability.

The principle of basing compensation for partial disability upon loss of earning power is adopted, with respect to temporary partial disability, in all the acts in this country except those of Alaska, Iowa, New Jersey, Porto Rico and Wyoming; and is adopted, with respect to permanent partial disability, in the acts of Arizona, California, Colorado, Kansas, Massachusetts, New Hampshire, Rhode Island, Texas, Washington, West Virginia and the federal government.

5. *Compensation for Death.*

(1) *Funeral Expenses.* The employer should be required to pay a sum not exceeding $100 for funeral expenses in addition to any other compensation.

In California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Vermont, Washington, West Virginia and Wyoming, and under the federal law, funeral expenses are paid in all cases of death, whether or not there are dependents. The same is true in Maryland, unless the decedent's estate is large enough to pay such expense. The maximum limit is $200 in Maine, Massachusetts, Michigan and Rhode Island, while Alaska, Illinois and Ohio allow $150, and Nevada $125.

(2) *Compensation for Widow.* If living with the decedent at the time of his death, or if dependent, the widow should be granted 35 per cent. of his wages until her death or remarriage, with a lump sum on remarriage equal to two years' compensation.

The method of compensation for cases of death recommended in this and in the succeeding paragraphs is substantially the

same as in Hawaii, Louisiana, Minnesota, Nevada, New York, Pennsylvania and Vermont, and under the federal law. The provision for a lump sum payment to the widow on remarriage is adopted in Minnesota, Nevada, New York, Oregon, Washington and West Virginia.

(3) *Compensation for the Widower.* If living with the decedent at the time of her death and dependent upon her support, the widower should receive 35 per cent. of her wages, or a proportionate amount if his dependency is only partial, to be paid until his death or remarriage.

(4) *Compensation for Widow or Widower and Children.* In addition to the compensation provided for the widow and widower, 10 per cent. should be allowed for each child under eighteen not to exceed a total of 66⅔ per cent. for the widow or widower and children. Compensation on account of a child should cease when it dies, marries or reaches the age of eighteen.

(5) *Compensation to Children if There Be No Widow or Widower.* In case children are left without any surviving parent, 25 per cent. should be paid for one child under eighteen, and 10 per cent. for each additional such child, to be divided among such children share and share alike, not exceeding a total of 66⅔ per cent. Compensation on account of any such child should cease when it dies, marries or reaches the age of eighteen.

(6) *Compensation to Parents, Brothers, Sisters, Grandchildren and Grandparents if Dependent.* For such classes of dependents 25 per cent. should be paid for one wholly dependent, and 5 per cent. additional for each additional person wholly dependent, divided among such wholly dependent persons, share and share alike, and a proportionate amount (to be determined by the Accident Board) if dependency is only partial, to be divided among the persons wholly or partially dependent, according to the degree of dependency as determined by the Accident Board. These percentages should be paid in cases where there is no widow, widower, or child. Where there is a widow, widower, or child, the members of this class should receive as much of these percentages as, when added to the total percentage

payable to the widow, widower or child, will not exceed a total of 66⅔ per cent. Compensation to members of this class should be paid only during dependency.

(7) *Compensation for Alien Non-Resident Dependents.* Aliens should be placed on the same footing as other dependents.

In Hawaii, New Hampshire and New Jersey alone are alien non-resident dependents expressly and entirely excluded from compensation. In Maryland, Michigan, Minnesota, Nevada, West Virginia and Wisconsin and, in part, in Colorado, Connecticut, Kansas, Kentucky, Maine, Montana, Nebraska, New York, Oklahoma, Oregon, Pennsylvania, Washington and Wyoming they are expressly included. In the other States they are apparently included in the absence of any reference to them.

(8) *Maximum and Minimum Compensation for Death.* The wages on which death compensation is based should be taken to be not more than $30 per week nor less than $10 per week; but the total amount of the weekly compensation should not be more than the actual wages.

6. *Commutation of Periodical Compensation Payments.* If the beneficiary is or is about to become a non-resident of the United States, or if the monthly payments to the beneficiary are less than $5 a month, or if the Accident Board determines that it would be to the best interests of the beneficiary, the employer should be permitted to discharge his liability for future payments by the immediate payment of a lump sum equal to the present value of all the future payments computed at 4 per cent. true discount, compounded annually. For this purpose the expectancy of life should be determined according to a suitable mortality table, to be selected at the discretion of the Accident Board, and the probability of the happening of any contingency, such as marriage or the termination of disability, affecting the amount or duration of the compensation, should be disregarded.

Substantially similar provisions are found in nearly all the States and in the federal law.

II. EMPLOYMENTS TO BE INCLUDED. It is believed that sufficient progress has now been made in public education on the problem, and in the development of efficient and economical machinery for insuring the employer against his compensation liability, to justify the inclusion in the system of all employments. The only exception which should be made is of casual employees in the service of employers who have only such employees and who, therefore, cannot fairly be required to carry compensation insurance policies. Such policies, on payment of a small additional premium, are now drawn so as to embrace casual as well as regular employees. No serious burden is, therefore, entailed on employers, even of domestic servants, in making them liable to pay compensation even to casual employees.

The principle of limiting the act to so-called "hazardous employments" is adopted only in Arizona, Kansas, Louisiana, Maryland, Montana, New Hampshire, New York, Oklahoma, Oregon, Washington and Wyoming, and, in part, in Illinois, and in most of these States employers and employees in other employments may elect to come under compensation.

Farm labour and domestic service are excepted from the operation of the act in nearly all the States, either expressly or indirectly.

In Alaska, Kansas, Kentucky, Nebraska, Nevada, Ohio, Oklahoma, Porto Rico, Texas and Wyoming the operation of the act is limited to employers employing more than a certain number of employees, ranging from one to five; and in Colorado, Connecticut, Maine, Rhode Island, Vermont and Wisconsin employers of less than a certain number are not subjected to the abrogation of the defences in case they refuse to elect compensation. In all the other States there is no distinction as to the number of employees.

In Iowa, New Hampshire, Washington and Wyoming, and apparently in Maryland, the employees to be included are limited to persons engaged in the hazardous part of the employment. In all the other States persons engaged in clerical work as well as those engaged in manual work are included.

Casual employees are included in Alaska, Kansas, Louisiana, Nevada, New York and Oklahoma, and under the federal law.

III. INJURIES TO BE INCLUDED. Compensation should be provided for all personal injuries in the course of employment, and death resulting therefrom within six years, but no compensation should be allowed where the injury is occasioned by the wilful intention of the employee to bring about the injury or death of himself or of another. The act should embrace occupational diseases which, when contracted in the course of employment, should be considered personal injuries for which compensation is payable.

In all the States except Montana, Ohio, Pennsylvania, Texas, Washington, West Virginia and Wyoming the injury must arise "out of" as well as "in the course of" the employment.

The principle of limiting the time within which death must occur in order to form a basis for compensation is found in Arizona, California, Colorado, Connecticut, Hawaii, Kentucky, Louisiana, Maryland, Nebraska, Ohio, Pennsylvania, Porto Rico, Vermont and West Virginia, and in the federal law.

The exception of injuries caused by the wilful intention of the employee is found in Alaska, Colorado, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Porto Rico, Rhode Island, Vermont, Washington, West Virginia and Wisconsin, and in the federal law.

Occupational diseases are included as personal injuries entitling the employee to compensation in California and Massachusetts, and in the federal law.

IV. OTHER REMEDIES THAN THOSE PROVIDED BY THE COMPENSATION ACT. One of the weightiest arguments against the outworn system of employers' liability is that it causes vast sums to be frittered away in law suits that should be used in caring for the victims of accidents. To avoid this waste the compensation provided by the act should be *the exclusive remedy*. If the employer has been guilty of personal negligence, even going to the point of violating a safety statute, his punishment should be through a special action prosecuted by the State itself, not through a civil suit for damages carried on at the expense and risk of the injured employee.

This is the law in Connecticut, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Rhode Island, Wisconsin and Wyoming, except that in a few of these States if the employer fails to insure the payment of compensation the injured employee has the option of claiming compensation or of suing at law with the defences removed.

V. Security for the Payment of Compensation Awards. The supreme tests of a compensation system are, first, the incentive provided for reducing accidents to the utmost, and, second, the promptness and certainty with which compensation claims are met. The strongest incentive toward prevention results from imposing the whole expense of compensation upon the employer. The irregularity and uncertainty of accidents, however, makes this policy inexpedient for small employers with limited financial resources. Security can only be attained through some system of insurance. Employers should, therefore, be required to insure their compensation liability.

Alaska, Arizona, California, Kansas, Louisiana, Minnesota, Nebraska and New Jersey are the only States which do not require in some form or other the employer to secure the payment of compensation either by insurance or by the giving of a bond.

In accordance with the plans of insurance at present provided for, employers may either:

1. Maintain their own insurance fund, subject to the approval of the Accident Board;

In Colorado, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Vermont, West Virginia and Wisconsin the employer is permitted to carry his own insurance, if satisfactory to the administrative authority.

2. Insure in a Mutual Association authorised to insure compensation liability;

Insurance in a mutual association is permitted in most States, including California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas and Wisconsin.

3. Insure in a State Insurance Fund managed by the Accident Board upon the same principles and subject to the same general requirements as those governing Mutual Insurance Associations;

State insurance funds are established in California, Colorado, Maryland, Michigan, Montana, Ohio, Oregon, New York, Nevada, Pennsylvania, Porto Rico, Washington, West Virginia and Wyoming.

4. Insure in a private stock company, such companies to be subjected to the most rigid regulation as regards the rates to be charged, the agents' commissions to be paid, and the methods of compensation to be used, so that the State may be spared the experience of some States which have tried to organise an efficient State insurance system while subjecting such system to the unscrupulous competitive methods unfortunately employed by too many agents of the casualty companies.

Insurance in private stock companies is allowed in every State except Nevada, Oregon, Porto Rico, Washington, West Virginia and Wyoming.

VI. Organisation of Accident Board. It is essential to the successful operation of the compensation system that an Accident Board be created. This board should consist of three or five members appointed by the Governor with the consent of the Senate. The board should have power to employ necessary assistants. Its members should be required to devote their entire time to its work and should not be permitted to carry on any other business or profession for profit. The entire cost of administration of the Accident Board, including the administrative expenses of conducting the State Insurance Fund managed by the

Accident Board, should be paid out of an appropriation made by the State.

Accident boards are provided in all of the States except Alaska, Arizona, Kansas, Louisiana, Minnesota, Nebraska, New Hampshire, Rhode Island and Wyoming.

VII. PROCEDURE FOR SETTLEMENT OF COMPENSATION CLAIMS. Provision should be made for the settlement of compensation claims either by agreement, subject to the approval of the Accident Board, or if no such agreement be reached, by arbitration before a committee composed as follows: One representative of the employer, one representative of the claimant, one member of the Accident Board or an authorised deputy. The decision of this committee should be made conclusive, unless the appeal therefrom is made to the Accident Board within a specified time. The Accident Board's disposition of the case on appeal from the Arbitration Committee should be final and conclusive unless appeal therefrom is taken within a specified time. Appeals from decrees of the Accident Board should not be allowed, except on questions of law, and should be carried direct to the highest court.

Agreements must be approved by the Accident Board in California, Colorado, Connecticut, Hawaii, Indiana, Kentucky, Maine, Massachusetts, Michigan, New York, Oklahoma, Pennsylvania and Vermont. In Iowa and Wisconsin agreements may be disapproved within a certain time. In Illinois an agreement to waive the provisions of the act as to the amount payable must be approved by the board. In Minnesota and Rhode Island agreements must be approved by the court. The same is true in New Jersey in the case of minors.

The procedure here recommended for the settlement of compensation where no agreement is reached is substantially the same as in Hawaii, Illinois, Iowa, Massachusetts, Michigan and Oklahoma.

VIII. REPORTS OF ACCIDENTS. The bill should contain provisions similar to those of the Standard Accident Reporting Bill of the American Association for Labor Legislation, now in use

for about half the industrial population of the country, requiring full and accurate reports of all industrial accidents as a basis for computation of future industrial accident rates and for future safety regulations to decrease or prevent accidents.

The essential features of workmen's compensation law here outlined are urged on the basis of a careful study of the whole question and of the compensation legislation not only of other States but of European countries. As one of the functions of the Association for Labor Legislation is to promote the enactment of uniform labour laws, it earnestly recommends to the careful consideration of legislators and of those who are interested in social progress the country over, the foregoing just, reasonable and progressive workmen's compensation standards.

APPENDIX C

DIGEST OF WORKMEN'S COMPENSATION LAWS

A brief digest of the workmen's compensation law of each state and of the United States is printed herewith. This digest is of each law as it stood at the end of 1916. The digest is made for the purpose of showing at a glance the kind of law in force in each state as compared with the standards recommended by the American Association for Labor Legislation. Only the fundamentals of the different laws are digested, and the digest is confined to seven principal headings, the nature of the law, its application, the waiting period, statutory medical aid, indemnity, the insurance requirements, and the administrative provisions.

ARIZONA

Nature of law. Compulsory as to employers. Elective by employees after injury.

Application. The law applies to employments designated "especially dangerous." Employers and employees in other occupations may voluntarily elect provisions of the law.

Waiting period. None if disability lasts longer than two weeks. No payment for disability lasting less than two weeks.

Statutory medical aid. None except in fatal cases where no dependents survive, then reasonable medical and burial expenses.

Indemnity. Fatal cases: Payments to dependents equal to 2,400 times one-half daily wages, not more than $4,000.00. Non-fatal cases: Total disability, 50 per cent. of semi-monthly earnings, not to exceed $4,000.00 Partial disability, semi-

monthly payments equal to one-half difference in earnings during incapacity, not to exceed $4,000.00.

Insurance. No provisions.

Administration. By agreement, by arbitration, or by submission to the Attorney-General. If these methods fail then by civil action at law.

CALIFORNIA

Nature of law. Compulsory.

Application. The law is of general application, excepting domestic and agricultural labour, and casual employees. It is elective as to the excepted classes.

Waiting period. Two weeks.

Statutory medical aid. During first 90 days, and longer if Commission orders.

Indemnity. Fatal cases: Burial expenses in all cases not to exceed $100.00. Total dependents, three times annual earnings of deceased, not less than $1,000.00 nor more than $5,000.00, payable at least in monthly instalments equal to 65 per cent. of wages. Partial dependents, such proportion of payments to total dependents as corresponds to the ratio between earnings of deceased and his contributions to their support. Non-fatal cases: Permanent disability, 65 per cent. of average weekly wages for 240 weeks, after that 40 per cent. of weekly earnings is payable during the remainder of life. Temporary total disability, 65 per cent. of average weekly wages during the disability, maximum 240 weeks. Temporary partial disability, 65 per cent. of loss of weekly wages during disability, maximum 240 weeks. Wages are computed on the basis of maximum annual earnings of $1,666.66 and minimum annual earnings of $333.33.

Insurance. Optional with private employers in any manner chosen by them. A state fund is created, and municipalities are required to insure in that fund unless risk is refused by the Fund.

Administration. By an "Industrial Accident Commission"

consisting of three members. Hearings may be held anywhere by the Commission or by a Referee appointed by the Commission. Appeal to the Court from decision of the Commission.

COLORADO

Nature of law. Elective.

Application. The law is of general application, excepting domestic service, farm and ranch labour, and casual employees. It does not apply to employers who regularly have less than four employees in and about the same place of employment. Employers and employees who are exempt may come under the law by voluntary election.

Waiting period. Three weeks.

Statutory medical aid. During first 30 days, not to exceed $100.00. Special operating fee of $50.00 in hernia cases.

Indemnity. Fatal cases: No dependents; medical and funeral expenses not to exceed $100.00. Total dependents, 50 per cent. of average weekly wages, maximum $8.00 a week, for six years, minimum $1,000.00 maximum $2,500.00. Partial dependents, the same rate as for total dependents, to continue during such portion of six years as Commission may determine, not to exceed $2,500.00. Non-fatal cases: Total disability, 50 per cent. of average weekly wages, minimum $5.00 maximum $8.00 a week, during disability. Partial disability, 50 per cent. of impairment of earning power, maximum $8.00 a week, up to $2,080.00. Specific payments are provided for specific dismemberments.

Insurance. Required in stock or mutual company, or State Fund. Self insurance is permitted on proof of financial ability.

Administration. By an "Industrial Commission" appointed by another act, consisting of three members. Commission hears disputes, and hearings may be held anywhere. Appeal to the Court from decision of Commission.

CONNECTICUT

Nature of law. Elective.

Application. The law is of general application, excepting

only employers who have regularly less than five employees, and casual employees and outworkers.

Waiting period. Ten days.

Statutory medical aid. All that is necessary.

Indemnity. Fatal cases: Burial expenses up to $100.00 in all cases. Total dependents, 50 per cent. of average weekly earnings of deceased, minimum $5.00 maximum $10.00 a week, for not more than 312 weeks. Partial dependents, weekly compensation, determined according to the measure of dependence, not to exceed one-half of earnings of deceased, subject to same limitations as in cases of total dependency. Non-fatal cases: Total disability, 50 per cent. of average weekly earnings, minimum $5.00 maximum $10.00 a week, for 520 weeks. Partial disability, 50 per cent. of loss in average weekly wages, maximum $10.00 a week, up to 312 weeks. Specific payments are provided for specific dismemberments.

Insurance. Required in stock or mutual companies. Self insurance may be permitted on filing of satisfactory security.

Administration. By Commissioners appointed one for each Congressional District. Appeal to the Court from decision of Commissioner.

ILLINOIS

Nature of law. Elective. Election implied in certain enumerated employments. Employers in other employments may elect, but forfeit no defences by failure to elect.

Application. The law applies particularly to certain specifically enumerated classes of occupations. Casual employees are excepted.

Waiting period. Six days in cases of temporary disability. None in cases of total permanent disability.

Statutory medical aid. Not over eight weeks and not to exceed $200.00.

Indemnity. Fatal cases: No dependents, funeral expenses, not to exceed $150.00. Total dependents, a sum equal to four years' earnings of deceased, paid in installments equal to one-

half average earnings, at same intervals as wages, minimum $1,650.00 maximum $3,500.00 Partial dependents, such a percentage of amount due to total dependents as the support rendered by the deceased was to his earnings. Non-fatal cases: Total disability, 50 per cent. of earnings, minimum $6.00 maximum $12.00 a week, until payments equal death benefit, then a sum annually equal to 8 per cent. of death benefit, but not less than $10.00 a month. Partial disability, 50 per cent. of loss of earning capacity, maximum $12.00 a week, for not more than eight years. Specific payments are provided for specific dismemberments in addition to other compensation. Allowances are also made for disfigurements.

Insurance. Employer electing to pay compensation must insure obligation, or furnish proof of financial ability.

Administration. By an "Industrial Board," consisting of three members. Arbitrator appointed by Board or Committee of Arbitration hears disputes. Hearings may be held anywhere. Decision of Arbitrator or Committee decision of Board unless appeal is taken to the Court.

INDIANA

Nature of law. Elective.

Application. The law is of general application, excepting only farm and agricultural labour, domestic servants and casual employees.

Waiting period. Fourteen days.

Statutory medical aid. During first thirty days, but employer may at his option continue treatment during disability.

Indemnity. Fatal cases: Burial expenses in all cases not to exceed $100.00. Total dependents, 55 per cent. of average weekly wages of deceased, minimum $5.50 maximum $13.20 a week, for remainder of period between death and 300 weeks after injury. Partial dependents, such proportion of amount payable to total dependents as amount contributed by deceased to their support bore to his annual earnings. Non-fatal cases: Total disability, 55 per cent. of average weekly wages, minimum $5.50

maximum $13.20 a week for 500 weeks. Partial disability, 50 per cent. of loss in earning power, maximum $12.00 a week, not to exceed 300 weeks. Specific payments are provided for specific dismemberments.

Insurance. Required in some company authorised to write workmen's compensation insurance. Self insurance permitted on proof of financial ability.

Administration. By an "Industrial Board," consisting of three members. Board holds hearings, which may be held anywhere. Appeal to the Court from decision of Board.

IOWA

Nature of law. Elective.

Application. The law is of general application, excepting domestic servants, farm labour, agricultural pursuits, and casual employees.

Waiting period. Two weeks.

Statutory medical aid. During first two weeks, not to exceed $100.00.

Indemnity. Fatal cases: Expenses of last sickness and burial expenses in all cases, not to exceed $100.00. Total dependents, 50 per cent. of average weekly wages of deceased, minimum $5.00 maximum $10.00 a week, for 300 weeks. Partial dependents, such proportion of amount payable to total dependents as amount contributed to their support by deceased bore to his annual earnings. Non-fatal cases: Total disability, 50 per cent. of average weekly wages, minimum $5.00 maximum $10.00 a week, for 400 weeks. Partial disability, same as for total disability, up to 300 weeks. Specific payments are provided for specific dismemberments.

Insurance. Required in some approved corporation, association, or organisation. Self insurance permitted on proof of financial ability.

Administration. By agreement subject to approval of Industrial Commissioner, or by arbitration with review by the Indus-

trial Commissioner. Appeal may be taken to the Court from the decision of the Industrial Commissioner.

KANSAS

Nature of law. Elective.

Application. The law applies to employments "determined to be especially hazardous." Not applicable unless five or more employees are employed continuously, except in mines. Employers of less than five workmen may elect to come within the Act.

Waiting period. The Act does not apply to injuries disabling for less than two weeks. If disability lasts over two weeks, compensation begins from date of accident.

Statutory medical aid. No provisions, except in fatal cases where no dependents survive, then $100.00 for medical attendance and burial.

Indemnity. Fatal cases: No dependents, medical and funeral expenses, not to exceed $100.00. Total dependents, three times earnings for previous year, minimum $1,200.00 maximum $3,600.00. Partial dependents, such proportion of payments to total dependents as may be agreed upon. Non-fatal cases: Total disability, 50 per cent. of average weekly wages, minimum $6.00 maximum $15.00 a week, up to eight years. Partial disability, payments not less than 25 per cent. nor more than 50 per cent. of average weekly wages, minimum $3.00 maximum $12.00 a week, not to exceed eight years.

Insurance. Not required.

Administration. By agreement or by arbitration, subject to appeal to the Court.

KENTUCKY

Nature of law. Elective. Election is express as to both employer and employee.

Application. The law is of general application, excepting domestic service, agriculture, and common carriers which come under the laws of the United States.

Waiting period. Two weeks.

Statutory medical aid. Ninety days, unless Board within that time otherwise directs, not to exceed $100.00. $200.00 in hernia cases if operation is performed.

Indemnity. Fatal cases: Burial expenses in all cases not to exceed $75.00. No dependents, $100.00 to personal representatives. Total dependents, 65 per cent. of average weekly earnings of deceased, minimum $5.00 maximum $12.00 a week, for 335 weeks, not to exceed $4,000.00. Partial dependents, amount proportionate to total dependents, subject to same limitations. Non-fatal cases: Total disability, 65 per cent. of average weekly earnings, minimum $5.00 maximum $12.00 a week, not to exceed eight years and maximum of $5,000.00. Partial disability, 65 per cent. of difference in earning capacity, maximum $12.00 a week, not to exceed 335 weeks or $4,000.00. Specific payments are provided for specific dismemberments.

Insurance. Required in some authorised corporation, association, or organisation, or self-insurance may be permitted on proof of financial ability.

Administration. By a "Workmen's Compensation Board" consisting of three members, one for each of three Compensation Districts. Hearings held by member of Board or by Referee, and may be held anywhere. Decision is decision of Board when approved by the Board. Appeal may be taken to the Court on questions of law.

LOUISIANA

Nature of law. Elective.

Application. The law applies to certain enumerated "hazardous trades, businesses, and occupations." Employers and employees in other occupations can come under the law by voluntary agreement.

Waiting period. One week. If disability lasts six weeks or longer, compensation for the first weeks shall be paid.

Statutory medical aid. Not to exceed $150.00.

Indemnity. Fatal cases: Expenses of last sickness and burial in all cases, not to exceed $100.00. Dependents, 25 per cent. to

50 per cent. of wages of deceased, according to number of dependents and nature of dependency, minimum $3.00 maximum $10.00 a week, for 300 weeks. Non-fatal cases: Total disability, 50 per cent. of wages, minimum $3.00 maximum $10.00 a week, for 300 weeks. Partial disability, 50 per cent. of difference in earning capacity before and after injury, maximum $10.00 a week, for 300 weeks. Specific payments are provided for specific dismemberments.

Insurance. Not required.

Administration. Claims settled by agreement, subject to approval of the Court. No special administrative provisions.

MAINE

Nature of law. Elective.

Application. The law is of general application as to all private employers, excepting farm labourers, domestic servants, seamen on vessels engaged in interstate and foreign commerce, and casual employees, also employees engaged in the work of cutting, hauling, rafting, or driving logs.

Waiting period. Two weeks.

Statutory medical aid. Two weeks, up to $30.00, except in cases of major surgical operations; then the Commission fixes the obligation.

Indemnity. Fatal cases: No dependents, expenses of last sickness and burial, not to exceed $200.00. Total dependents, 50 per cent. of average weekly wages, minimum $4.00 maximum $10.00 a week, for 300 weeks. Partial dependents, such proportion of payments to total dependents as the amount contributed by deceased to their support bore to his annual earnings. Non-fatal cases: Total disability, 50 per cent. of average weekly wages, minimum $4.00 maximum $10.00 a week, for 500 weeks, up to $3,000.00. Partial disability, 50 per cent. of difference in earnings before and after injury, maximum $10.00 a week, for 300 weeks. Specific payments are provided for specific dismemberments, then compensation for partial disability if such disability exists.

Insurance. Required in approved stock or mutual company or association.

Administration. By an "Industrial Accident Commission" consisting of three members. Hearings held by Chairman, and may be held anywhere. Appeal to the Court on questions of law.

MARYLAND

Nature of law. Compulsory as to specified "extra hazardous" occupations. Employers and employees in occupations not enumerated as "extra hazardous" may come under the act by joint election.

Application. The law is of limited application, and applies to certain enumerated employments. It exempts farm labourers, domestic servants, country blacksmiths, casual employees, and employees whose salary is in excess of $2,000.00 a year.

Waiting period. Two weeks in cases of temporary disability. One week in cases of permanent total disability.

Statutory medical aid. Not to exceed $150.00.

Indemnity. Fatal cases: Burial expenses in all cases not to exceed $75.00. Total dependents, 50 per cent. of average weekly wages of deceased for remainder of period between death and eight years from date of injury, minimum $1,000.00 maximum $4,250.00. Partial dependents, same payments as for total dependents for such portion of eight years as Commission shall determine, maximum $3,000.00. Non-fatal cases: Total disability, 50 per cent. of average weekly wages, minimum $5.00 maximum $12.00 a week, not to exceed $5,000.00. Partial disability, 50 per cent. of difference in average weekly wages, maximum $12.00 a week, not to exceed $3,000.00. Specific payments are provided for specific dismemberments.

Insurance. Required in stock company or mutual association, or State Fund. Self insurance permitted on proof of financial ability.

Administration. By a "State Industrial Accident Commission" consisting of three members. Hearings held by Commis-

sion or by Arbitration Committee; hearings may be held anywhere. Appeal to the Court from decision of Commission.

MASSACHUSETTS

Nature of law. Elective.

Application. The law is of general application, excepting domestic servants, farm labourers, seamen on vessels engaged in interstate or foreign commerce, casual employees, and those whose employment is not in the usual course of the trade, business, profession, or occupation of their employers.

Waiting period. Ten days.

Statutory medical aid. Two weeks. The Board may order further treatment in unusual cases.

Indemnity. Fatal cases: No dependents, expenses of last sickness and burial, not to exceed $200.00. Total dependents, 66⅔ per cent. of average weekly wages of deceased, minimum $4.00 maximum $10.00 a week, for 500 weeks, not to exceed $4,000.00. Partial dependents, proportion of payments to total dependents that amount contributed by deceased to support of partial dependents bore to annual earnings. Non-fatal cases: Total disability, 66⅔ per cent. of average weekly wages, minimum $4.00 maximum $10.00 a week, for 500 weeks, not to exceed $4,000.00. Partial disability, 66⅔ per cent. of difference in average weekly wages, maximum $10.00 a week, subject to same limits as for total disability. Specific payments are provided for specific dismemberments in addition to other compensation.

Insurance. Required in Massachusetts Employees Insurance Association, or in some liability company authorised to do business in the State.

Administration. By an "Industrial Accident Board" consisting of five members. Hearings held by committee of arbitration, and may be held anywhere. Decision of committee decision of Board unless claim for review is filed with the Board. Appeal to the court from decision of Board on questions of law.

MICHIGAN

Nature of law. Elective.

Application. The law is of general application, excepting domestic servants and farm labourers, and casual employees.

Waiting period. Two weeks, but if disability continues for eight weeks or longer compensation is payable from date of injury.

Statutory medical aid. Three weeks.

Indemnity. Fatal cases: No dependents, expenses of last sickness and burial, not to exceed $200.00. Total dependents, 50 per cent. of average weekly wages of deceased, minimum $4.00 maximum $10.00 a week, for 300 weeks. Partial dependents, proportion of amount payable to total dependents that amount contributed to support of partial dependents by deceased bore to his annual earnings. Non-fatal cases: Total disability, 50 per cent. of average weekly wages, minimum $4.00 maximum $10.00 a week, for 500 weeks, not to exceed $400.00. Partial disability, 50 per cent. of difference in average weekly wages before and after injury, maximum $10.00 a week, for 300 weeks. Specific payments are provided for specific dismemberments.

Insurance. Required in stock or mutual companies, in state "Accident Fund," or self insurance may be permitted on proof of financial ability.

Administration. By an "Industrial Accident Board" consisting of three members. Committee of arbitration appointed by Board holds hearings, which may be held anywhere. Decision of committee decision of Board unless claim for review is filed. Appeal to the court from decision of Board on questions of law.

MINNESOTA

Nature of law. Elective.

Application. The law is of general application, excepting common carriers by steam railroads, domestic servants, farm labourers and casual employees.

Waiting period. Two weeks in cases of temporary total or temporary partial disability.

Statutory medical aid. During 90 days not to exceed $100.00, but court may order treatment for 100 days not to exceed $200.00.

Indemnity. Fatal cases: Expenses of last sickness and burial in all cases, not to exceed $100.00. Total dependents, payments ranging from 25 per cent. to 60 per cent. of wages of deceased, according to number of dependents, minimum $6.50 maximum $11.00 a week, for 300 weeks. Partial dependents, that proportion of benefits for total dependency, subject to same limits, which amount contributed to their support by deceased bore to total income of partial dependents. Non-fatal cases: Total disability, 50 per cent. of wages, minimum $6.50 maximum $11.00 a week, for 550 weeks, not to exceed $5,000.00. Partial disability, 50 per cent. of difference in earnings, maximum $11.00 a week, for 300 weeks. Specific payments are provided for specific dismemberments.

Insurance. Not required.

Administration. By agreement, or by the court in cases of dispute. The Commissioner of Labor advises in disputed cases, and assists in adjusting differences.

MONTANA

Nature of law. Elective.

Application. The law applies to employments enumerated as hazardous, and any other hazardous employments that may arise. Domestic servants, farm and agricultural labourers, and casual employees are excepted.

Waiting period. Two weeks.

Statutory medical aid. Two weeks, not to exceed $50.00. Special operating fee of $50.00 in hernia cases.

Indemnity. Fatal cases: Burial expenses in all cases if death occurs within six months not exceeding $75.00. Dependents, payments ranging from 30 per cent. to 50 per cent. of wages of deceased, according to kinship of dependents, minimum $6.00 maximum $10.00 a week, for 400 weeks. Non-fatal

cases: Total disability, 50 per cent. of wages, minimum $6.00 maximum $10.00 a week, for 400 weeks, then $5.00 a week during disability. Partial disability, 50 per cent. of difference in earnings, maximum $10.00 a week, for 150 weeks in permanent partial disability cases, and 50 weeks in temporary partial disability cases. Specific payments are provided for specific dismemberments.

Insurance. Required in authorised insurance company or State Fund, or self insurance is permitted on proof of financial ability.

Administration. By an "Industrial Accident Board" consisting of three members. Board or any member may hold hearings, which may be held anywhere. Appeal to the court from decision of Board.

NEBRASKA

Nature of law. Elective.

Application. The law is of general application, applying to every employer employing more than five employees. Those employers and employees not under the act may come under it by joint election. Domestic servants, farm labourers, and casual employees are excepted.

Waiting period. Fourteen days, but if the disability continues for eight weeks or longer compensation begins from date of injury.

Statutory medical aid. For first 21 days, not to exceed $200.00.

Indemnity. Fatal cases: Expenses of last sickness and burial in all cases not to exceed $100.00. Total dependents, 50 per cent. of wages of deceased, minimum $5.00 maximum $10.00 a week, during dependency not exceeding 350 weeks. Partial dependents, same proportion of benefits for total dependency as contributions of deceased to support of partial dependents bore to his wages. Non-fatal cases: Total disability, 50 per cent. of wages, minimum $5.00 maximum $10.00 a week, for 300 weeks. After that 40 per cent. of wages, minimum

$4.00 maximum $8.00 a week, during disability. Partial disability, 50 per cent. of difference in earnings, maximum $10.00 a week, for 300 weeks. Specific payments are provided for specific dismemberments.

Insurance. Not required.

Administration. By agreement, by arbitration, or by submission to the court.

NEVADA

Nature of law. Elective.

Application. The law is of general application, including all employments where two or more employees are employed. Farm or agricultural labour and domestic servants are excepted.

Waiting period. One week, but if the disability continues beyond two weeks compensation shall be payable from date of injury.

Statutory medical aid. Four weeks.

Indemnity. Fatal cases: Burial expenses in all cases not to exceed $125.00. Total dependents, payments ranging from 40 per cent. to 60 per cent. according to number, minimum $20.00 maximum $60.00 a month, for 100 months, not exceeding $6,000.00. Partial dependents, proportion of amount payable to total dependents that amount contributed by deceased to support of total dependents bore to his wages, not to exceed 100 months. Non-fatal cases: Total disability, 50 per cent. of average monthly wages, minimum $20.00 maximum $60.00 a month, not exceeding 100 months or $5,000.00. Partial disability, 50 per cent. of difference in earnings before and after injury, maximum $40.00 a month, for 60 months. Specific payments are provided for specific dismemberments, in addition to other compensation.

Insurance. Employers electing to come under the act must insure in the State Insurance Fund.

Administration. By the "Nevada Industrial Commission" consisting of three members. There appears to be no provision for appeal from the decision of the Commission.

NEW HAMPSHIRE

Nature of law. Elective.

Application. The law is of limited application, and applies to certain specified classes of occupations dangerous to life and limb, and to certain occupations where five or more persons are engaged in manual or mechanical labour.

Waiting period. Two weeks.

Statutory medical aid. None except in case of death without dependents, then expenses of medical attendance and burial not to exceed $100.00.

Indemnity. Fatal cases: No dependents, medical attendance and burial expenses not to exceed $100.00. Total dependents, 150 times average weekly wages of deceased, not to exceed $3,000.00. Partial dependents, proportion of amount payable to total dependents that amount contributed by deceased to support of partial dependents bore to his wages. Non-fatal cases: Total disability, 50 per cent. of average weekly earnings, maximum $10.00 a week, for 300 weeks. Partial disability, 50 per cent. of difference in earning capacity, maximum $10.00 a week, for 300 weeks.

Insurance. No requirements for insurance. Employer electing act must satisfy Commissioner of Labor of his financial ability, or file bond.

Administration. Disputes not settled by agreement are determined by an action in equity.

NEW JERSEY

Nature of law. Elective.

Application. The law is of general application, excepting casual employees and employees receiving a greater salary than $1,200.00 a year.

Waiting period. Two weeks.

Statutory medical aid. Two weeks, not to exceed $50.00.

Indemnity. Fatal cases: Expenses of last sickness and burial in all cases, not to exceed $100.00. Dependents, 35 per

cent. to 60 per cent. of wages of deceased, according to number of dependents, minimum $5.00 maximum $10.00 a week, for 300 weeks. Non-fatal cases: Total disability, 50 per cent. of wages, minimum $5.00 maximum $10.00 a week, for 400 weeks. Partial disability, 50 per cent. of wages, minimum $5.00 maximum $10.00 a week, based upon extent of disability, for 300 weeks. Specific payments are provided for specific dismemberments.

Insurance. No provisions.

Administration. By agreement subject to approval of the "Workmen's Compensation Aid Bureau," or by submission to the court. Appeal to the Supreme Court on questions of law.

NEW YORK

Nature of law. Compulsory as to certain enumerated occupations. Elective as to the occupations not included in the enumerated list.

Application. The law is of limited application, and applies to certain enumerated "hazardous" employments. Farm labourers and domestic servants are excepted.

Waiting period. Two weeks.

Statutory medical aid. During 60 days.

Indemnity. Fatal cases: Burial expenses in all cases not to exceed $100.00. Dependents, payments during dependency, ranging from 25 per cent. to 66⅔ per cent. of wages of deceased, according to nature of dependency and kinship to deceased. Payments based upon maximum wages of $100.00 a month. Non-fatal cases: Total disability, 66⅔ per cent. of average weekly wages, minimum $5.00 maximum $20.00 a week, during disability. Partial disability, 66⅔ per cent. of difference in earning capacity, maximum $20.00 a week, not to exceed $3,500. Specific payments are provided for specific dismemberments.

Insurance. Required in stock corporation, mutual association, or State Fund. Self insurance permitted on proof of financial ability.

Administration. By the "State Industrial Commission" consisting of five members. Hearings are held by a Commissioner or a Deputy Commissioner, and may be held anywhere. Appeal may be taken to the court from decision of Commission on questions of law, or Commission may certify questions of law to the court for decision.

OHIO

Nature of law. Compulsory as to employers of five or more workmen in the same business or same establishment.

Application. The law is of general application to all employers of five or more persons in the same business or establishment. Employers not subject to the act may come under it by election.

Waiting period. One week.

Statutory medical aid. Not exceeding $200.00.

Indemnity. Fatal cases: Burial expenses in all cases not to exceed $150.00. Total dependents, 66⅔ per cent. of average weekly wages of deceased for 6 years, minimum $1,500.00 maximum $3,750.00. Partial dependents, 66⅔ per cent. of average weekly wages of deceased for such portion of 6 years as the Commission may determine, maximum $3,750.00. Non-fatal cases: Total disability, 66⅔ per cent. of average weekly wages, minimum $5.00 maximum $12.00 a week, during continuance of disability. Partial disability, 66⅔ per cent. of loss of earning capacity, maximum $12.00 a week, not to exceed $3,750.00. Specific payments are provided for specific dismemberments.

Insurance. Required in "State Insurance Fund," but employers may, when permitted by the Commission, carry their own insurance or maintain insurance funds, provided they contribute to the reserves of the "State Insurance Fund."

Administration. By the "Industrial Commission." Appeal to the court from the decision of the Commission.

OKLAHOMA

Nature of law. Compulsory as to certain specified "hazardous employments."

Application. The law is of limited application, applying to enumerated "hazardous employments" where two or more workmen are employed. Any other hazardous occupations that may arise are covered. Agricultural, horticultural, retail mercantile pursuits, dairy and stock raising are excepted.

Waiting period. Fourteen days.

Statutory medical aid. For 15 days after injury.

Indemnity. Fatal cases: Because of constitutional complications the act was not made to apply to fatal cases. Non-fatal cases: Total disability, 50 per cent. of average weekly wages, minimum $6.00 maximum $10.00 a week, for 500 weeks. Partial disability, 50 per cent. of difference in wages before and after injury, maximum $10.00 a week, for 300 weeks. Specific payments are provided for specific dismemberments.

Insurance. Required in stock company, mutual association, or by interinsurance. Self insurance is permitted on proof of financial ability.

Administration. By the "State Industrial Commission" consisting of three members. Commission may require hearing before committee of arbitration; hearings may be held anywhere. Decision of Commission final on questions of fact; appeal may be taken to the court from decision of Commission on questions of law.

OREGON

Nature of law. Elective.

Application. The law is of limited application, applying to certain enumerated "hazardous" classes of occupations. Employers and employees in occupations not under the act may come under it by joint election.

Waiting period. None.

Statutory medical aid. Up to $250.00.

Indemnity. Fatal cases: Burial expenses in all cases not to exceed $100.00. Total dependents, payments ranging from $15.00 to $50.00 a month, according to number of dependents. Partial dependents, 50 per cent. of average support received

from deceased during the preceding year, not to exceed $30.00 a month. Non-fatal cases: Total disability, payments up to 60 per cent. of monthly wages for the first six months, then payments up to $50.00 a month during disability, depending upon number in family. Partial disability, proportionate amount corresponding to loss of earning power, for two years. Specific payments are provided for specific dismemberments.

Insurance. Compulsory in "Industrial Accident Fund," administered by the State, when compensation is elected.

Administration. By "State Industrial Accident Commission." Appeal to the court from decision of the Commission.

PENNSYLVANIA

Nature of law. Elective.

Application. The law is of general application, excepting only domestic service, agriculture, and casual employment.

Waiting period. Fourteen days.

Statutory medical aid. Up to $25.00, unless major operation is necessary, then up to $75.00.

Indemnity. Fatal cases: Burial expenses in all cases not to exceed $100.00. Payments to widow or widower and to relatives in the direct line, ranging from 20 per cent. to 60 per cent. of wages, according to the number of dependents, minimum $2.00 maximum $12.00 a week, for 300 weeks. Payments to minor children, ranging from 15 per cent. to 50 per cent. of wages, according to number, until they reach the age of sixteen. Payments to relatives in the collateral line ranging from 15 per cent. to 25 per cent., according to number. Non-fatal cases: Total disability, 50 per cent. of wages, minimum $5.00 maximum $10.00 a week, for first 500 weeks, maximum $4,000.00. Partial disability, 50 per cent. of difference in earning power before and after injury, maximum $10.00 a week, for not more than 300 weeks. Specific payments are provided for specific dismemberments.

Insurance. Required in stock or mutual companies, or in

State Fund. Self insurance may be permitted on proof of financial ability.

Administration. By a "Workmen's Compensation Board" consisting of three members. The Board appoints Referees, and Referee or Board conduct hearings, which may be held anywhere. Referee's finding of fact final unless Board allows an appeal. Appeal may be taken to the court from decision of Board on questions of law.

RHODE ISLAND

Nature of law. Elective.

Application. The law is of general application, but it does not apply to employers who employ five or less workmen. Employers not under the act may come under it by election. Domestic service, agriculture, casual employees, and employees who receive remuneration exceeding $1,800.00 a year are excepted.

Waiting period. Two weeks.

Statutory medical aid. During the first two weeks after injury.

Indemnity. Fatal cases: No dependents, expenses of last sickness and burial, not exceeding $200.00. Total dependents, 50 per cent. of average weekly wages of deceased, minimum $4.00 maximum $10.00 a week, for 300 weeks. Partial dependents, proportionate part of benefits to total dependents that amount contributed to support of partial dependents by deceased bore to his annual earnings. Non-fatal cases: Total disability, 50 per cent. of average weekly wages, minimum $4.00 maximum $10.00 a week, for 500 weeks. Partial disability, 50 per cent. of difference in average weekly wages before and after injury, maximum $10.00 a week, for 300 weeks. Specific payments are provided for specific dismemberments in addition to other compensation.

Insurance. Required in some approved stock or mutual company or association. Self insurance permitted on proof of financial ability, or satisfactory security may be furnished.

Administration. By agreement, or by submission to the Superior Court in case of dispute. Appeal may be taken to the Supreme Court from the decision of the Superior Court.

TEXAS

Nature of law. Elective.

Application. The law is of general application, applying to all employers who have five or more employees in their employ. Domestic servants, farm labourers, employees of railways operated as common carriers, and labourers working for a cotton gin are excepted.

Waiting period. One week.

Statutory medical aid. One week.

Indemnity. Fatal cases: No beneficiaries, expenses of last sickness, and in addition funeral expenses not to exceed $100.00. No beneficiaries but creditors, an amount not exceeding benefits due to dependents. Beneficiaries, 60 per cent. of average weekly wages, minimum $5.00 maximum $15.00 a week, for 360 weeks, compensation to be distributed according to the law providing for the distribution of other property of deceased. Non-fatal cases: Total disability, 60 per cent. of average weekly wages, minimum $5.00 maximum $15.00 a week, for 400 weeks. Partial disability, 60 per cent. of difference in average weekly wages before and after injury, maximum $15.00 a week, for 300 weeks. Specific payments are provided for specific dismemberments, in addition to other compensation.

Insurance. Employer electing act must insure in "Texas Employers' Insurance Association," or in company admitted to do business in the State.

Administration. By an "Industrial Accident Board" consisting of three members. Board or any member may hold hearings, which may be held anywhere. Appeal to the Court from decision of Board.

VERMONT

Nature of law. Elective.

Application. The law is of general application, excepting domestic servants, employers who regularly employ ten men or less, casual employees, and employees whose remuneration exceeds $1,500.00 a year. Employers who are exempt may come under the act by election.

Waiting period. Fourteen days.

Statutory medical aid. During first fourteen days, not to exceed $75.00.

Indemnity. Fatal cases: Burial expenses in all cases, not to exceed $75.00. Dependents: 15 per cent. to 45 per cent. of average weekly wages of deceased, based upon a minimum wage of $5.00 a week and a maximum wage of $25.00 a week, according to number and kinship of dependents, and nature of dependency, up to 260 weeks, and subject to a maximum of $3,500.00. Non-fatal cases: Total disability, 50 per cent. of average weekly wages, minimum $3.00 maximum $12.00 a week, for 260 weeks. Partial disability, 50 per cent. of difference in average weekly wages before and after accident, maximum $10.00 a week, for five years. Specific payments are provided for specific dismemberments.

Insurance. Required in some company authorised to transact the business of workmen's compensation insurance in the State, or by deposit of securities. Self insurance is permitted on proof of financial ability.

Administration. By the "Industrial Accident Board" consisting of three members. Board holds hearings, which may be held anywhere. Appeal to the Court from decision of Board.

WASHINGTON

Nature of law. Compulsory as to specified "extra hazardous" employments.

Application. The law is of limited application, applying to certain enumerated "extra hazardous" classes of occupations. If

any other "extra hazardous" occupations arise they will come under the act.

Waiting period. None, but no compensation is payable unless loss of earning power exceeds 5 per cent.

Statutory medical aid. None, but benefits are increased by 50 per cent. for the first six months in total temporary disability cases.

Indemnity. Fatal cases: Burial expenses in all cases not to exceed $75.00. Dependents, payments to widow or invalid widower during life, or until remarriage, and to minor children until the age of 16 is reached, ranging from $20.00 to $35.00 a month, according to the number of children. Payments to other dependents equal to 50 per cent. of average monthly support received from deceased, maximum $20.00 a month, during dependency. Non-fatal cases: Total disability, payments ranging from $20.00 to $35.00 a month, according to number in family, increased 50 per cent. for the first six months, maximum 60 per cent. of monthly wages, during disability. Partial disability, lump sum not to exceed $1,500.00. No compensation unless loss of earning power exceeds 5 per cent.

Insurance. Required in the "State Accident Fund."

Administration. By the "Industrial Insurance Department" consisting of three members. Appeal to the Court from decision of Department.

WEST VIRGINIA

Nature of law. Elective.

Application. The law is of general application, excepting casual employees, domestic and agricultural service, travelling salesmen, members of firms, and officers of associations or corporations.

Waiting period. One week.

Statutory medical aid. Not to exceed $150.00, except that in permanent disability cases the Commissioner may order treatment up to $300.00.

Indemnity. Fatal cases: Funeral expenses in all cases not to exceed $75.00. Total dependents, payments to a widow or

invalid widower and children, ranging from $20.00 to $35.00 a month, according to number of children, until each child reaches the legal age of employment, and until death or remarriage of widow or widower. Payments to orphan children ranging from $10.00 to $30.00 a month, until they reach the age of 15. Other persons who are total dependents, 50 per cent. of average monthly support from deceased, maximum $20.00 a month, for six years. Partial dependents, 50 per cent. of average monthly support received from deceased for such portion of six years as Commissioner may determine. Non-fatal cases: Total disability, permanent, 50 per cent. of average weekly wages, minimum $4.00 maximum $8.00 a week, during remainder of life. Temporary, 50 per cent. of average weekly wages, minimum $5.00 maximum $10.00 a week, for twenty-six weeks, or for fifty-two weeks in case of certain specific injuries. Partial disability: Permanent; payments ranging from 10 per cent. to 50 per cent. of average weekly wages, minimum $4.00 maximum $8.00 a week, during remainder of life. Temporary: 50 per cent. of weekly loss in wages, maximum $10.00 a week.

Insurance. Required in "Workmen's Compensation Fund" managed by the "Compensation Commissioner." Self insurance permitted on proof of financial ability, or employers may form and maintain their own funds.

Administration. By the "Compensation Commissioner." Claimant may appeal to the Supreme Court of Appeals if his right to receive compensation is denied.

WISCONSIN

Nature of law. Elective.

Application. The law is of general application, applying to employers of four or more employees in a common employment, excepting farmers and farm labourers, casual employees, and employees on railways operating as common carriers.

Waiting period. One week, except in cases where the disability extends beyond four weeks, then indemnity is payable for the first week.

Statutory medical aid. Ninety days.

Indemnity. Fatal cases: No dependents, burial expenses not exceeding $100.00. Total dependents, death after permanent total disability, four times average annual earnings, but when added to the disability indemnity due at the time of the death of deceased shall not exceed six times his average annual earnings. Death after permanent partial disability, four times average annual earnings. Partial dependents, an amount not exceeding four times the amount devoted to the support of partial dependents by deceased during the year preceding death. Death benefits shall be paid in instalments corresponding to 65 per cent. of weekly earnings of deceased. Minimum annual wages, $375.00 to $500.00, maximum $750.00 to $1,250.00, according to employment. Non-fatal cases: Total disability, 65 per cent. of average weekly earnings, increased to 100 per cent. after ninety days in cases of total helplessness, not exceeding six times average annual earnings of injured; aggregate disability period not to exceed fifteen years from date of accident. Partial disability, 65 per cent. of weekly loss in wages, not exceeding four times average annual earnings and not exceeding a disability period of fifteen years from date of accident. Specific payments are provided for specific dismemberments. (See "Fatal Cases" for minimum and maximum of average annual earnings.)

Insurance. Insurance is permitted, but it does not exempt the employer from liability under the law. Employer may be relieved from liability, after liability has accrued, by deposit with designated trust company, or by purchase of an annuity.

Administration. By the "Industrial Commission" consisting of three members. Any member of the Commission or an Examiner appointed by the Commission may hold hearings, which may be held anywhere. Commission makes its award after final hearing. Appeal may be taken to the Court from the decision of the Commission.

WYOMING

Nature of law. Compulsory as to "extra hazardous" employments.

Application. The law is of limited application, applying to certain enumerated classes of "extra hazardous" occupations. Casual employees, employees not subject to the hazards of the business, and those holding official positions or standing in a representative capacity, are excepted; also employees engaged in interstate commerce.

Waiting period. Ten days.

Statutory medical aid. Evidently contemplated by the law, but no provisions appear in the law as to who shall pay for the treatment.

Indemnity. Fatal cases: Burial expenses in all cases not to exceed $50.00, unless otherwise by agreement. Dependents, to widow or invalid widower, $1,000.00, and $60.00 a year for each child under sixteen, but not to exceed the lump sum for living spouse. To dependent parents if no widow, widower, or children survive, 50 per cent. of average monthly support received from the deceased, not to exceed $500.00. Non-fatal cases: Permanent total disability, $1,000.00 if unmarried; $1,200.00 if married and no children; this sum is increased by $60.00 a year for each child up to the time that the child reaches the age of sixteen, the aggregate payments not to exceed $1,800.00. Temporary total disability, payments ranging from $15.00 to $35.00 a month, according to number in family, to continue during the continuance of the disability, not to exceed the amount payable for permanent total disability. No provisions for temporary partial disability. Specific payments are provided for specific dismemberments.

Insurance. Compulsory in "Industrial Accident Fund" administered by the State.

Administration. By the Judge of the District Court, subject to trial by jury in certain cases. Appeal to Supreme Court from the decision of the District Court.

UNITED STATES [1]

Act of September 7, 1916

Nature of law. Compulsory.

Application. The law applies to all employees of the United States.

Waiting period. Three days.

Statutory medical aid. For a reasonable time. Such services are supplied by the United States medical officers and hospitals, but when this is not practicable, by private physicians and hospitals approved by the Commission.

Indemnity. Fatal cases: Burial expenses in all cases in the discretion of the Commission, not to exceed $100.00. Dependents: Payments ranging from 20 per cent. to 66⅔ per cent. of monthly pay of deceased, according to number and kinship to deceased. Payments are during dependency, or until minor children reach the age of eighteen. Payments are based upon a minimum of $50.00 and a maximum of $100.00 as monthly pay of deceased. Non-fatal cases: Total disability, 66⅔ per cent. of monthly pay during disability, minimum $33.33 maximum $66.67. Partial disability, 66⅔ per cent. of difference between previous monthly pay and monthly wage earning capacity after the beginning of partial disability, during continuance, maximum $66.67 a month.

Insurance. The "Employees' Compensation Fund" is established, an appropriation is made for it, and it is to be supported by such sums as Congress may from time to time appropriate for the purpose.

Administration. By the "United States Employees' Compensation Commission" consisting of three members. Principal office is in Washington, but the Commission may perform its work anywhere. Authority of Commission is absolute.

[1] This act was drawn in accordance with the standards prescribed by the American Association for Labor Legislation.

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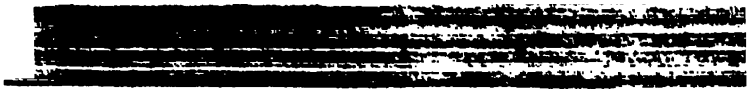
Allen v. Ætna Life Insurance Co., 163.
Bain v. Atkins, 163.
Borgnis v. Falk, 122.
Branconnier's Case, 197.
Cantwell's Case, 189.
Carr v. American Locomotive Co., four cases, 17, 18, 19.
Caspar v. Lewin, 75.
Connolly v. Bolster, 163.
Cunningham v. Northwestern Improvement Co., 102, 114.
DeWitt's Case, 139.
Farwell v. Boston & Worcester R. R. Corp., 77.
Employer's Liability Cases, 98.
Franklin v. United Railways & Electric Co., 91, 114.
Frye v. Bath Gas & Electric Co., 163.
Geceiwiec's Case, 191.
Gilbert's Case, 190.
Hawkins v. Bleakly, 127.
Hayden v. Smithville Mfg. Co., 22.
Holden v. Hardy, 66.
Hopkins v. Michigan Sugar Co., 190.
Hurle's Case, 138.
Ives v. South Buffalo R. R. Co., 104, 116, 229.
Jeffery Mfg. Co. v. Blagg, 127.
Johnson's Case, 138.
Jule's Case, 138.
Kentucky State Journal v. Workmen's Compensation Board, 124.
Kiley's Case, 191.
Leathers v. American Tobacco Co., 76.
Lynch's Case, 189.
Madden's Case, 122.
Maryland Casualty Co. v. Omaha Electric Light & Power Co., 167.
Mountain Timber Co. v. Washington, 127.
Munroe v. Maryland Casualty Co., 167.
Murray v. South Carolina R. R. Co., 77.
Newton's Case, 190.
New York Central R. R. Co. v. White, 126, 236.
Norway Plains Co. v. Boston & Maine R. R. Co., 9.
Oesting's Case, 191.
Opinions of the Justices, 120.
Rochville's Case, 191.
Rumford Falls Paper Co. v. Fidelity & Casualty Co., 167.
Schmidt v. The Travelers Insurance Co., 167.
Schwartz' Case, 189.
Silva's Case, 189.
Starnes v. Albion Mfg. Co., 76.
State ex rel. Davis-Smith Co. v. Clausen, 117.
Trieman's Case, 138.
Twoomey's Case, 189.
Weaver v. Maxwell Motor Co., 197.
Young v. Duncan, 122.



INDEX

Accident, determination of, 188.
must happen in course of employment, 188, 190–191.
must arise out of employment, 188, 190–191.
Accident insurance,
inception of, 30–31.
purpose of, 30.
methods of, 31–32.
underwriting of, 32–35.
not a solution of the problem of industrial accidents, 33–34, 217.
industrial accident insurance, 34–35.
workmen's collective policy, 35–37.
by mutual associations, 31–32, 37.
on group plan, 36, 217–218.
Accident prevention, see Conservation.
Administration of compensation systems,
Germany, 50–51.
Great Britain, 60.
United States, 180–201.
special form provided, 181.
administration by courts, 181.
principle of special administration, 182–185.
commission passes on questions of fact, 184.
appeal to courts on questions of law, 184.
administration in New York, 185–187.
Advisory opinions, principle of, 121.
Agricultural labour, excepted in nearly all laws, 136.
American Association for Labor Legislation, publications of, 278–279.
active in compensation movement, 223.
health insurance plan, 223–224.
Standards for Workmen's Compensation Laws, 153, 238–249.
American Bar Association, uniform workmen's compensation act recommended by, 153, 279.
Andrews, J. B., 72, 84, 225, 279.
Application of laws, depending upon number of employees constitutional, 127.
limited laws, 134–135.
general laws, 134–136.
precedents for passage of limited laws, 134–135.
limitations in all laws, 135–136.
determination of application of, 187–188.
all laws should be of general application, 213–214.
Arizona, constitutional provision, 126.
digest of compensation law, 250.
Assignment of compensation, forbidden, 151.
Assumption of risk, defence of, 12–13, 109.
modification of rule, 79.

Atlantic City conference on workmen's compensation, 106, 279.
Attachment of compensation rights, forbidden, 151.
Attorneys, regulation of charges of, 194–195.
Austin, C. B., 32, 278, 279.
Average weekly wages, compensation based on, 146.

Beckwith, O. R., 200, 279, 285.
Benefit associations, effect of acceptance of benefits, 38–39, 95–96.
Berry, E. S., 20, 279, 285.
Bismarck, influence in forcing German Social Insurance System, 42, 44–47.
Blackstone, William, 20, 279.
Blanchard, R. H., 225, 279.
Bradbury, H. B., 201, 279.
Brodsky, R. T., 61, 279.
Brooks, J. G., 20, 46, 279, 286.
  investigation in Germany, 86.
  report of, 61, 86.
Bullock, E. D., 178, 279.
Business of Insurance, publication edited by H. P. Dunham, 40, 279.

California, constitutional provision, 126.
  law may now cover occupational diseases, 139.
  digest of compensation law, 251.
Casual employment, usually excepted from operation of laws, 137.
Chicago conference on workmen's compensation, 106, 280.
Child labour legislation, see Women and children.
Children, see Women and children.
Civil rights, enlargement of, 6–7.
Clark, L. D., 20, 38, 84, 106, 280, 286.
Cliff, V. D., 40, 280.
Colorado, digest of compensation law, 252.
Commerce, see Interstate and foreign commerce.
Common law rights, preserved in some cases, 139, 208.
Common law system of employers' liability, basis of, 8–13.
  rules of, 12.
  defences, 12–13.
  criticism of, 13–19.
  statutory changes in, 63–84.
Commons, J. R., 72, 84, 225, 280.
Commutation, see Lump sum payments.
Compensation insurance, 157–179.
  forms of, 158, 174.
  state funds, 158, 174.
  mutual associations, 158, 174.
  stock companies, 158.
  self insurance, 158.
  compulsion to insure, 161.
  different from liability insurance, 161–162.
  approval of policy forms, 164.
  requirements in New York, 164–169.
  employer must bear cost of, 166.
  provisions of policy, 166–167.
  insurer must assume entire liability, 167–168.
  necessity of reserves, 168.
  cancellation of policy, 169.
  supervision of rates, 173–174.
Compensation legislation in the United States, 129–156.
  peculiar to this country, 119, 129, 131.
  in general harmony with other systems, 129–131.
  rapid spread of, 130–131.

adaptation of English and German systems, 131–132.
Compensation movement, a world movement, 2.
must be considered in its historical aspect, 2.
Compensation system, basis of, 3–4, 140.
Compulsion to insure, see Compensation insurance.
Compulsory compensation laws,
held unconstitutional, 104, 114–117.
held constitutional, 117–118, 126–127.
about one-third are, 133.
Connecticut, digest of compensation law, 252.
Conservation, essential element of compensation system, 144, 202–204.
of indemnity payments, 145–146.
forms of, official and unofficial, 204.
purpose of, 204–205.
official efforts for, 204–208.
unofficial efforts for, 209–212.
Constitution of United States, state compensation laws not in conflict with, 126–127.
Constitutionality,
of labour legislation, 64–66.
of workmen's compensation laws, 107–128.
practical constitutional considerations, 64–65, 86–88, 107.
Maryland law of 1902 unconstitutional, 91.
Montana law of 1909 unconstitutional, 102.
technical constitutional considerations, 107–113.
provisions in state constitutions authorising compensation laws, 126.
of social insurance legislation, 222–223.
Contributory negligence, defence of, 12–13, 110–111.
modification of rule, 79.
Corporate organisation, adapted to necessities of industrial life, 6.
Cotton gin, invention of, 5.
Cowles, W. G., 153, 178, 179, 280, 285.

Damages, principles of at common law, 15–16.
Dawson, M. M., chairman of committee which drew compensation bill in New York, 89.
publications of, 54, 61, 128, 178, 278, 280, 285.
Dawson, W. H., 46, 51, 54, 61, 280.
Day, W. A., 225, 280.
Delay, not permitted in compensation proceedings, 192.
Dependency, determination of, 149, 197.
Dependents, kinds of, 144, 148–149.
payments to, 149.
Deprivation of property, see Due process of law.
Digests of compensation laws, 250–277.
Disability, kinds of, in non-fatal cases, 144–145.
disputes regarding, 195–196.
Diseases, disability resulting from, 188–189.
see also Occupational diseases.
Dismemberments, provisions for, 147–148.
Domestic service, excepted in nearly all laws, 136.
Driggers, G. H., 156, 281.

Due process of law, 111–112, compulsory laws do not violate constitutional guarantee of, 126–127.
Duffy, T. J., 178, 278, 281.
Dunham, H. P., see Business of insurance.
Dunham, S. C., 40, 280, 281, 287.

Eastman, Crystal, 39, 40, 278, 281.
Economics, theory of in England, 7, 55–56.
effect of theory, 7, 55–56.
Elective compensation laws, principle of, 118–120.
held constitutional, 120–123, 126.
distinctive national type, 119, 133.
about two-thirds are, 133.
devised to meet constitutional objections to compulsory laws, 118–119.
history of principle, 96, 119–120, 133.
Ely, R. T., 20, 84, 278, 281.
Employer and employee, transition from relation of master and servant, 4–5.
equal before the law, 7, 11, 21–22.
Employers' liability, see Common law system, and Compensation system.
Employers' liability acts, 77.
nature of, 78–79.
in the United States, 79.
Employers' liability insurance, see Liability insurance.
England, see Great Britain.
Essentials for compensation laws, 140, 238–249.
Europe, background of workmen's compensation in, 41–61.
see also Germany, and Great Britain.
Examination of injured by impartial physician, 196.
Exemptions in compensation laws, 135–137.
Extra-territorial effect of compensation laws, 151–153.

Factory inspection, see Labour legislation, enforcement of.
Farm labour, see Agricultural labour.
Farnam, H. W., 84, 278, 281.
Fatal cases, see Dependents, and No dependents.
Faxon, W. C., 40, 281, 285.
Federal jurisdiction, conflict of compensation laws with, 137.
Fellow-servant rule, 12–13, 109–110.
modification of, 78.
abrogation of, 77–78.
Fisher, W. C., 153, 281.
Flynn, B. D., 225, 281, 285.
Foot, Alfred, 40, 281.
Ford, John, introduced workmen's compensation bill in New York Senate, 89.
Frankel, L. K., 54, 61, 281.
Franklin, C. H., 40, 280, 281.
Freund, Ernest, 128, 278, 281.
Friedensburg, Ferdinand, 61, 281.
Funeral expenses, payment of, 149.

Germany, basis of study of problem, 2, 41.
origin of social insurance system, 42, 47–48.
legal situation in, 45.
sickness insurance in, 46.
sickness insurance system, 47–52.

accident insurance system, 48, 53.
old age and invalidity insurance, 48.
social insurance system, 47–53, 220–221.
Great Britain, basis of study of problem, 2, 41.
origin of compensation system, 54.
labour legislation in, 55–56.
repudiation of individualistic economic theories, 44, 55–56.
employers' liability act, 56.
workmen's compensation act, 56–57.
application of act, 57–58.
insurance of obligation, 58–60.
administration of law, 60.
adoption of social insurance plans, 221–222.
Gross negligence of injured, injuries caused by exempt from operation of law, 139, 191.
Group insurance, see Accident insurance and Life insurance.

Handicraft stage, transition from, 4–6.
Hard, William, 20, 281.
Hatch, L. W., 20, 281, 285.
Health, see Safety and health.
Health insurance, see Social insurance.
Henderson, C. R., 20, 40, 281.
Hendrick, B. J., 156, 282.
Hoffman, F. L., 40, 278, 282.
Hotchkiss, W. H., 178, 282.

Illinois, commission of 1905, 94.
report of commission, 94–97.
proposed bill for compensation by voluntary agreement, 95.
proposed social insurance bill, 96–97.
publications of, 282.
digest of compensation law, 253.
Indemnity provisions, 140–153.
payment of indemnity, 146.
conservation of payments, 145–146.
efforts to increase, 215–216.
Indiana, digest of compensation law, 254.
Industrial accidents, causes of, 21, 25.
effects of, 21–23.
problem of, 25–26.
provisions against effects of, 26–39.
Industrial accident insurance, see Accident insurance.
Industrial revolution, 4–7.
Industrial stage, transition to, 4–6.
Insurance, see Accident insurance, Compensation insurance, Group insurance, Liability insurance, Life insurance, and Social insurance.
Insurance company, party in interest in compensation proceedings, 191.
duties of, 191–192.
Insurance of compensation obligation, see Compensation insurance.
Interstate and foreign commerce, usually excepted in all laws, 137.
Intoxication, see Serious misconduct.
Inventions, causing transition from handicraft stage to industrial stage, 5.
Iowa, compensation law held constitutional, 127.
digest of compensation law, 255.

Jones, F. R., 153, 282.
Jury, see Trial by jury.

Kansas, digest of compensation law, 256.
Kent, James, 20, 282.
Kentucky, law held unconstitutional, 124–125.
digest of compensation law, 256.
Kingsbury, S. M., 84, 282.

Labour legislation,
volume of, 65.
classification of, 67.
enforcement of, 80–82.
effect of, 82–83, 205–209.
LaSalle, Ferdinand, influence on German thought, 44.
Law, F. E., 178, 282.
Lewis, F. W., 40, 282.
Lewis, W. D., 128, 282.
Liability insurance,
inception of, 27–28.
purpose of, 28–30.
effects of, 29–30, 161–163.
prevalent before adoption of compensation system, 28, 160.
different from compensation insurance, 161.
limitation of liability, 167.
schedule rating, 212.
Liability Insurance Association, publications of, 178, 282.
Life insurance, on group plan, 218–219.
Limited laws, see Application of laws.
Litigation, under common law system, 11–17.
elimination of under compensation, 180–181, 199–200.
Lloyd George, David, 221.
Lott, E. S., 178, 283.
Louisiana, digest of compensation law, 257.
Low, A. M., 56, 283, 286.
Lump sum payments, not favoured but permitted, 150, 198.
Lyman, T. U., 200, 283.

McKitrick, Reuben, 40, 283.
McVey, F. L., 20, 283.
Maine, digest of compensation law, 258.
Malingering, prevention of, 142, 195–196.
Marx, Karl, influence on German thought, 44.
Maryland, compensation law of 1902, 89.
scope of, 89–91.
declared unconstitutional, 91, 113–114.
law of 1910, 102.
digest of compensation law, 259.
Massachusetts, investigation regarding workingmen's insurance, 86.
investigation of 1903, 91–92.
proposed bill of 1904, 92–94.
law substituting agreement for compensation for common law liability, 99–101.
compensation law held constitutional, 120–122.
law covers occupational diseases, 138.
publications of, 154, 283.
digest of compensation law, 260.
Master and servant, transition of relation to employer and employee, law of, 4–5.
Maternity benefits, see Social insurance.
Medical aid, see Statutory Medical aid.

Medical testimony, importance of, provisions for, 195–196.
Merrels, F. B., 200, 283, 285.
Michigan, law does not cover occupational diseases, 138.
publications of, 283.
digest of compensation law, 261.
Minnesota, digest of compensation law, 261.
Misconduct, see Serious misconduct.
Mitchell, John, 201, 278, 283.
Montana, compensation law of 1909, 101–102.
law held unconstitutional, 102, 114–116.
digest of compensation law, 262.
Mule, spinning, invention of, 5.
Mutual associations, see Compensation insurance.

National Association of Industrial Accident Boards, proceedings of, 201, 283.
Nebraska, digest of compensation law, 263.
Negligence, see Contributory negligence, and Gross negligence.
Nevada, digest of compensation law, 264.
New Hampshire, comment on compensation law, 131.
digest of compensation law, 265.
New Jersey, first state to adopt comprehensive compensation law, 1.
digest of compensation law, 265.
New York, compensation bill of 1898, 89.
investigation of 1909, 102–103.
compulsory compensation law of 1910, 103–104.
law declared unconstitutional, 104, 116–117.
voluntary compensation law of 1910, 105–106.
constitutional provision, 126.
provision held constitutional by Supreme Court of United States, 126–127.
administration of law, 185–187.
insurance under law, 164–169.
outline of compensation movement in, 226–237.
publications of, 155, 284.
digest of compensation law, 266.
No dependents, payments usually limited to funeral expenses, 149–150.
Non-occupational accidents, insurance to cover, 217.

Occupational diseases, application of compensation laws to, 137–139.
covered in Massachusetts, 138.
not covered in Michigan, 138.
probably covered in California, 139.
probably will be covered, 216.
Ogg, F. A., 20, 225, 284.
Ohio, constitutional provision, 126.
publications of, 155, 284.
digest of compensation law, 267.
Ohio State Insurance Law, comments on, 155, 284.
Oklahoma, constitutional provision, 126.
digest of compensation law, 267.
Old age pension systems,
in Germany, 47–48.
in Great Britain, 221.
Operation of laws,
casual employments excepted, 137.
injuries caused by gross or wil-

ful negligence excepted, 139, 191.
Oregon, digest of compensation law, 268.

Packer, Launcelot, 62, 284.
Page, B. A., 40, 284, 285.
Parkinson, T. I., 106, 279, 284.
Partial dependency, see Dependents.
Partial disability, see Disability.
Parties in interest in compensation proceedings, 191–192.
Patterson, J. V., 156, 284.
Payment of indemnity, see Indemnity provisions, also Lump sum payments.
Pennsylvania, constitutional provision, 126.
digest of compensation law, 269.
Pension systems, see Old age pension systems.
Physicians and surgeons, regulation of charges of, 194.
See also Medical testimony.
Political tendencies, enlargement of political rights, 6–7.
Power loom, invention of, 5.
Pre-existing bodily defects, effect of, 196.
Principles which should be observed in compensation legislation, 140, 238–249.

Railroad operations, in relation to fellow-servant rule, 77–78.
Randolph, C. F., 128, 284, 286.
Reserves, see Compensation insurance.
Rhode Island, digest of compensation law, 270.
Rhodes, J. E., 2d., 40, 284, 285.
Roosevelt, Theodore, in favour of compensation system, 96–97.
recommendations in messages to Congress, 97–98.
Rowe, J. S., 178, 282.
Rubinow, I. M., 20, 39, 61, 153, 224, 225, 284.

Safety and health, laws relating to, 67–68, 206–207.
effect of violation of, 74–75, 80.
Safety first movement, 212–213.
Safety organisations, 210–212.
of employers, 210.
of insurance companies, 211–212.
Schedule rating, in liability insurance, 212.
Scott, Laura, 73, 278, 284.
Seager, H. R., 39, 224, 284.
Security of payments, 157–179.
under common law system, 16, 157.
essential element of compensation system, 157–158.
Self insurance, see Compensation insurance.
Serious misconduct, accidents arising from not covered, 191.
Sherman, P. T., 61, 178, 179, 279, 282, 284.
Sickness insurance, see Social insurance.
Social aspects of workmen's compensation, 202–225.
Social insurance, meaning and significance of, 220.
forms of, 220.
health or sickness insurance, 220.
maternity benefits, 220.
old age pensions, 220.
unemployment insurance, 220.
in Germany, 47–53, 220–221.
in Great Britain, 221–222.
constitutional difficulties in the United States, 222.

health insurance plan suggested by the American Association for Labor Legislation, 223–224.
Spinning jenny, invention of, 5.
Standards for workmen's compensation legislation, suggested by American Association for Labor Legislation, 153, 238–249, 278.
State constitutions, provisions authorising compensation laws, 126.
State funds, see Compensation insurance.
Statutory medical aid, provisions regarding, 143–144, 193–194, extension of, 143, 215.
Stimson, F. J., 24, 285.
Stock companies, see Compensation insurance.
Stone, J. T., 178, 283, 285.
Subrogation, permitted against party responsible for injuries, 151.
Summary proceedings, in compensation administration, 192–193.
Supreme Court of the United States, decisions in compensation cases, 126–127.
Surgeons, see Physicians and surgeons.
Surgical aid, see Statutory medical aid.

Texas, digest of compensation law, 271.
Textile industries, transition from handicraft state to industrial stage centred around, 4.
The Insurance Institute of Hartford, publications of, 285.
Third parties, rights against, 150–151.
Tolman, W. H., 224, 285.
Total dependency, see Dependents.
Total disability, see Disability.
Transition from common law system to compensation system, rapid, 1–2, 130.
Transition from handicraft stage to industrial stage, effect of, 5.
Trial by jury, element of common law system, 15–16, 111–112.

Unemployment insurance, see Social insurance.
Uniformity in compensation legislation, reasons for lack of, 88–89.
United States, rapidity of spread of compensation legislation in, 2, 130.
Act of May 30, 1908, 1, 85, 99.
amendments to act, 98.
administration of act, 1, 99.
legislation peculiar to this country, 129.
extent of legislation, 130.
legislation adapted from English and German laws, 132.
publications of, 285–287.
digest of compensation law of 1916, 277.
See also Constitution of United States.

Vermont, constitutional provision, 126.
digest of compensation law, 272.
Verrill, C. H., 61, 286, 287.
Villard, H. G., 62, 287.
Voluntary compensation laws, see Elective compensation laws.

Waiting period, provisions regarding, 141–143.
efforts to reduce, 215.
Waiver of compensation rights forbidden, 151.
Washington, state insurance law held constitutional by state court, 117–118.
by Supreme Court of the United States, 127.
publications of, 155–156, 287.
digest of compensation law, 272.
West Virginia, digest of compensation law, 273.
Wilful negligence, see Gross negligence.
William I, Emperor of Germany, connection with German system, 47.
Williams, L. C., 128, 287.
Willoughby, W. F., book on Workingmen's Insurance, 66, 287.
Wisconsin, suggestions of substitute for common law system, 96.
law held constitutional, 122–123.
publications of, 287.
digest of compensation law, 274.
Wolfe, S. H., 178, 282, 285, 287.
Women and children, laws relating to employment of, 72–73, 207–208.
effect of violation of, 76, 208.
Workman, effect of industrial revolution upon, 6.
Workmen's collective policy, see Accident insurance.
Wright, Carroll D., connection with inception of compensation movement, 86, 91.
Wyoming, constitutional provision, 126.
digest of compensation law, 275.

Yale Insurance Lectures, 287.
Yaple, W. D., 201, 279, 287.

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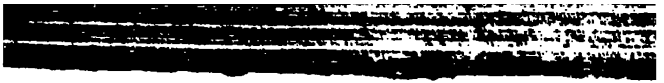

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